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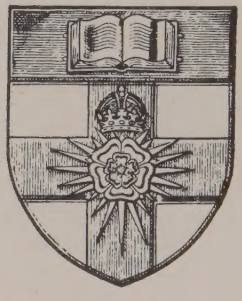

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THE CRIMINAL APPEAL REPORTS

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THE
CRIMINAL APPEAL REPORTS
1959

EDITED BY

T. R. FITZWALTER BUTLER

of the Inner Temple and Midland Circuit, Barrister-at-Law,
Recorder of Newark

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[CENTRAL CRIMINAL COURT CASE]

BEFORE

MR. JUSTICE SALMON

R. *v.* MACKINNON AND OTHERS

1958
Sept. 22

Share Pushing—"Reckless Making of [a] Statement"—Meaning of "Reckless"—Whether Dishonesty Involved—Prevention of Fraud (Investments) Act, 1939 (2 & 3 *Geo.* 5, *c.* 16), *s.* 12 (1) (*replaced by Prevention of Fraud (Investments) Act*, 1958 (6 & 7 *Eliz.* 2, *c.* 45), *s.* 13 (1)).

Conspiracy—Several Persons Charged as Conspirators in Magistrate's Court—Case Against One Thrown Out by Magistrate—Impropriety of Naming that Person as Conspirator in Indictment.

By section 12 (1) of the Prevention of Fraud (Investments) Act, 1939 [replaced by section 13 (1) of the Prevention of Fraud (Investments) Act, 1958], "any person who, by any statement, promise or forecast which he knows to be misleading, false or deceptive, or by any dishonest concealment of material facts, or by the reckless making of any statement, promise or forecast which is misleading, false or deceptive, induces or attempts to induce another person (*a*) to enter into or offer to enter into—(i) any agreement for . . . acquiring . . . securities . . . shall be guilty of an offence . . ."

For a statement to be "reckless" within the meaning of the above section it must be a dishonest or fraudulent statement, *i.e.*, a statement made without caring whether it be true or false, and "reckless" should not be interpreted as meaning "very careless."

DERRY *v.* PEEK (1889) 14 App.Cas. 337 followed.

BATES AND ANOTHER (1952) 36 Cr.App.R. 175 and dictum of Lord Goddard C.J. in RUSSELL [1953] 1 W.L.R. 77, at p. 81, not followed.

Trial at the Central Criminal Court before Salmon J.

Five defendants and two defendant companies were charged with various offences under the Prevention of Fraud

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(Investments) Act, 1939, including offences against section 12. During the trial the judge, after hearing arguments from counsel, gave a ruling on the meaning of the word " reckless " in that section.

Maxwell Turner and *J. H. M. Griffith-Jones* for the Crown.

H. J. Phillimore, Q.C., and *David Lloyd* for the first defendant.

Peter Rawlinson for the second defendant.

The first defendant company was not represented.

Neville Faulks and *David Hurst* for the third defendant.

R. E. Seaton for the fourth defendant.

F. H. Lawton, Q.C., and *William Howard* for the fifth defendant.

Sebag Shaw for the second defendant company.

SALMON J.: Section 12 (1) of the Prevention of Fraud (Investments) Act, 1939, so far as it is material, reads as follows: " Any person who, by any statement, promise or forecast which he knows to be misleading, false or deceptive, or by any dishonest concealment of material facts, or by the reckless making of any statement, promise or forecast which is misleading, false or deceptive, induces or attempts to induce another person—(*a*) to enter into or offer to enter into—(i) any agreement for . . . acquiring . . . securities . . . shall be guilty of an offence . . ." It is contended on behalf of the Crown that the word " reckless " in that section means no more than " very careless " and that, accordingly, anyone who very carelessly makes a false statement, promise or forecast and thereby induces or attempts to induce another to enter into any agreement for acquiring securities commits a criminal offence. According to the Crown's argument, providing the accused person is proved to have been very careless, he is guilty of this criminal offence, carrying with it a maximum sentence of seven years' imprisonment, even if he honestly believed in the truth of what he wrote or said. It is contended on behalf of the defence that the word " reckless " means not

caring whether the statement, promise or forecast be true or false, and that if an accused person honestly believed in the truth of what he had said or written he cannot be guilty of an offence under this section. The decision of Donovan J. in BATES AND ANOTHER (1952) 36 Cr.App.R. 175 is a clear decision in favour of the Crown's contention and is supported by an *obiter dictum* of the Court of Criminal Appeal in RUSSELL [1953] 1 W.L.R. 77, at p. 81. BATES AND ANOTHER (*supra*) is a highly persuasive authority, but it is not binding on me.

It is unnecessary for me to say with what profound respect I regard any judgment of Donovan J. or any observations of the Court of Criminal Appeal. I have, however, the great misfortune to differ from Donovan J. on the construction of this statute. I do so with misgiving and diffidence, but as I have reached a clear conclusion on the matter, I must give effect to it.

It is conceded that the word " reckless " is capable of either of the two rival meanings for which the Crown and the defence respectively contend. When a word is used in a statute which may have one of two meanings, I know of no canon of construction that compels the court to adopt the wider of the two meanings merely because it is the wider. The court must look at the word in its context in the statute and decide which meaning Parliament intended it to bear. Moreover, the courts are slow to construe a statute as creating a criminal offence unless the statute does so in the plainest terms. Ever since the celebrated case of DERRY *v.* PEEK (1889) 14 App.Cas. 337 the word " reckless," used in relation to false statements, strongly suggests a statement made by a person not caring whether it be true or false and accordingly a dishonest or fraudulent statement as distinct from one which is made with an honest belief in its truth.

I am here construing a statute whose very name is the Prevention of Fraud (Investments) Act, 1939. Its purpose, as it proclaims, is to make general provision for preventing fraud in connection with dealing with investments. Section 12 (1) deals with false statements, promises and forecasts.

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Salmon J.

The cross-heading which immediately precedes this section reads thus: "General provisions for the prevention of fraud." It seems to me, therefore, that it would be wrong to approach this section on the basis that, unless its language compels me to a contrary view, "reckless" must bear the wide meaning contended for by the Crown rather than the meaning attributed to it in DERRY *v.* PEEK (*supra*). It would, at any rate, be surprising if Parliament, in a section creating a number of offences whose very essence is fraud, had included an offence which had nothing to do with fraud. It is, to me at any rate, almost incredible that, if that had been Parliament's intention, it would have carried it out by the use of the word "reckless," a word which, used in relation to false statements, had by 1939 for about forty years generally been understood to indicate fraud. When Parliament intends, as in the case of a prospectus, that the careless making of an untrue statement shall constitute a criminal offence, irrespective of fraud, it does so in the clearest language. One has only to look at section 44 of the Companies Act, 1948, and compare it with the section I am considering.

The Crown relies on the following passage in the judgment of Donovan J. in BATES AND ANOTHER (1952) 36 Cr.App.R. at p. 181: "If one analyses section 12 (1), it is found to deal with three categories of persons who have induced or attempted to induce other persons to invest money. The first is the person who makes a statement which he knows to be misleading, false or deceptive; the second is the person who dishonestly conceals material facts; and the third is the person who recklessly makes a statement, promise or forecast which is misleading, false or deceptive. Categories 1 and 2 obviously refer to persons who are dishonest, but, after referring to a person who has knowingly made a false statement or has dishonestly concealed material facts, the legislature, introducing its third category by the disjunctive 'or,' changes its language altogether. It does not specify a person who knowingly makes a misleading, false or deceptive statement, promise or forecast, or dishonestly makes it. It simply

specifies a person who recklessly makes these things." I agree that section 12 appears to deal with three categories of persons. To my mind, however, they all three have the common characteristic of dishonesty. There is very little, if any, difference between categories 1 and 2. It would appear that category 2 is included only *ex abundanti cautela* to cover the sort of facts that existed in KYLSANT (LORD) (1932) 23 Cr. App.R. 83; [1932] 1 K.B. 442. If any fact that is omitted from a statement, promise or forecast is material, it can only be material in that its omission makes what has been said misleading, false or deceptive. If the omission is dishonest, it can only be dishonest because the person who makes it knows that what he has said is false, misleading or deceptive by reason of the omission. I am inclined to think that category 2 is already covered by category 1. It is true that the third category is introduced by the disjunctive "or," and involves a change of language which does not include the word "dishonest." This point, however, does not greatly impress me. It is to be observed that the word "dishonest," which is used in the second category, is not used in the first category, and the second category is also introduced by the disjunctive "or." No one suggests that this is any reason for supposing that the first category does not involve dishonesty.

In my judgment, the legislature intended this section to cover all fraudulent statements, promises and forecasts made for the purposes specified in the section. It might, of course, have read simply: "Any person who dishonestly makes any statement, promise or forecast which is misleading, false or deceptive" and so on. The legislature, however, recites (as is the usual practice in pleadings in civil actions) the well-known elements constituting dishonesty. To make quite certain that it covers the KYLSANT (LORD) type of case (*supra*), it introduces the words "dishonest concealment of material facts." It is for this purpose essential to use the word "dishonest," because an innocent concealment would be outside the scope of this section.

It has also been argued that, as the section refers not only

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to statements and promises, but also to forecasts, the section must be intended to cover careless though honest forecasts because of the difficulty of proving the absence of an honest belief in a forecast. I do not think it is permissible to construe this statute as creating the criminal offence for which the Crown contends because of the difficulties of proof which might be involved in a contrary construction. In any event, once it is proved that the forecast is misleading, false or deceptive, and that there were no reasonable grounds for believing it, there exists powerful evidence that the accused person who made the forecast for some purpose of his own must either have known that it was untrue or had no honest belief in its truth. Often in the case of alleged fraudulent statements the only evidence of dishonesty consists of evidence that no grounds exist on which any reasonable man could have believed in the truth of the statement. In my experience, juries are not slow in a proper case to draw the inference of fraud.

For these reasons I am unable to hold that this section, which makes general provisions for the prevention of fraud, has by a side wind created an offence entirely independent of fraud. I shall, therefore, direct the jury that the word "reckless" in this section has the same meaning as that attributed to it in DERRY *v.* PEEK (*supra*).

[The judge further drew attention to the fact that in count 1 of the indictment which charged conspiracy to defraud and other counts charging conspiracy one Hill, the investment manager of one of the defendant companies, had been named as a conspirator, though the committing magistrate had dismissed him from the case on the ground that there was no evidence of conspiracy against him. The judge, after directing that Hill's name be struck out of the indictment, a course which the Crown did not seek to resist, said: "I am bound to confess I am shocked by it. A charge of conspiracy was made against this man before the magistrate. The magistrate threw out the case on the ground that there was no evidence of conspiracy against him. When these

counts are framed against these defendants, instead of being satisfied with the usual allegation that they conspired together or with persons unknown, someone deliberately put Mr. Hill's name in the counts, which means that the jury were being invited to brand him as a criminal, without giving him a chance of being heard. I consider that is shockingly unfair. In case it should happen again that a number of people are charged before the magistrate with conspiracy and one of them escapes in the magistrate's court, I express the view that it is wholly wrong to name that one as a conspirator in a count against the other defendants. The circumstances are rare indeed where it is proper to name a living man as a conspirator unless you make him a defendant and thus give him a chance to be heard in his own defence."

The judge subsequently ruled that in the case of two of the defendants and one defendant company there was no case to answer, and directed their acquittal. In the case of the other three defendants and the second defendant company he discharged the jury from giving a verdict. These last-named were all tried and convicted at the next Sessions of the Central Criminal Court.]

Solicitors: For the first defendant, Isadore Goldman & Son; for the second defendant, B. A. Perkoff; for the third defendant, P. R. Kimber; for the fourth defendant, Sole, Sawbridge & Co.; for the fifth defendant and the second defendant company, Claude Hornby & Cox.

CIRCUIT CASE

[MIDLAND CIRCUIT]

BEFORE

MR. JUSTICE ELWES

1958
Oct. 8

R. *v.* NOTT

Murder—Defence of Insanity—Rebutting Evidence by Prosecution that Defendant was not Insane but Suffered from Diminished Responsibility.

On a trial for murder, where the defence was insanity, leave granted to the prosecution to call rebutting medical evidence to the effect that the prisoner was not insane, but suffered from diminished responsibility.

Trial before Elwes J. at Bedfordshire Assizes.

The prisoner was charged with murder. The defence was that of insanity and one medical witness was called to establish that defence, and was cross-examined by counsel for the prosecution. At the close of the case for the defence the prosecution asked leave to call rebutting evidence, intimating that the witnesses whom they desired to call would say that the prisoner was not insane within the M'Naughten Rules at the time of the offence, but did come within the definition of diminished responsibility under section 2 (1) of the Homicide Act, 1957. The defence did not seek to resist this application.

Graham Swanwick, Q.C., and *Nigel Robinson* for the prosecution.

J. A. Grieves, Q.C., and *J. R. T. Hooper* for the defence.

ELWES J., after referring to R. *v.* BASTIAN (1958) 42 Cr. App.R. 75, where the converse procedure had taken place,

gave the prosecution leave to call rebutting evidence, and two doctors gave evidence to the effect aforementioned, and were cross-examined by counsel for the defence.

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R. *v.* NOTT

Elwes J.

Verdict: Guilty but Insane.

Solicitor: For the defence, Leeds Smith, Sandy.

[The Editor is indebted to J. R. T. Hooper, Esq., Barrister-at-Law, for a report of this case.]

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE STREATFEILD AND MR. JUSTICE DIPLOCK

LUND *v.* THOMPSON

1958
Oct. 21

Road Traffic—Notice of Intended Prosecution—Service of Notice within Fourteen Days—Letter from Police Stating Intention Not to Prosecute—Further Letter Stating Proceedings would be Instituted—Validity of Notice—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 21 (*c*).

Section 21 of the Road Traffic Act, 1930, provides: "Where a person is prosecuted for an offence under any of the provisions . . . of this Act relating . . . to reckless or dangerous driving, and to careless driving he shall not be convicted unless either (*a*) he was warned at the time the offence was committed that the question of prosecuting him . . . would be taken into consideration; . . . or (*c*) within . . . 14 days [of the commission of the offence] a notice of the intended prosecution specifying the nature of the alleged offence . . . was served on or sent by registered post to him . . ."

On February 11, 1958, the appellant was involved in a

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traffic incident. On February 14 a notice was served on him, signed by a police officer, that it was intended to institute proceedings against him for dangerous driving and driving without due care and attention on February 11 and containing all the necessary particulars. On February 27 a letter was sent to the appellant by the police stating that after careful consideration they had decided not to take any further action in the matter. On March 13 a further letter was sent to him by the police stating that after further consideration the Commissioner of Metropolitan Police had decided to institute proceedings against him for both offences. Informations for both offences were preferred at the magistrate's court. The magistrate was of opinion that the notice of February 14 was valid and had not been invalidated by subsequent events. He dismissed the information for dangerous driving, but fined the appellant on the information for driving without due care and attention, to which he had pleaded guilty.

Held, that once notice of intended prosecution had been given as required by the section, the only condition precedent to prosecution had been fulfilled; that it was impossible to read words such as "and has not been withdrawn" into section 21 (*c*); and that the magistrate was, accordingly, right in holding the notice of February 14 as remaining valid. In the opinion of the court, however, the practice adopted in the present case was not one which should be followed.

Case stated by a metropolitan magistrate.

An information was preferred at Marlborough Street magistrate's court by the respondent, Donald Thompson, a police officer, charging the appellant, Richard Irvin Lund, with careless driving. A further information was preferred charging the appellant with dangerous driving.

On February 11, 1958, the appellant was involved in a traffic incident at Eaton Gate in London. On February 14 a notice was served on him signed by a police officer that it was intended to institute proceedings against him for dangerous driving and driving without due care and attention on February 11, and giving all necessary particulars. On February 27 a letter was sent to him by the police stating that after careful consideration they had decided not to take any further action in the matter. On March 13 a further letter was sent to him by the police stating that after further

consideration the Commissioner of Metropolitan Police had decided to institute proceedings against him. The magistrate was of opinion that the notice sent on February 14 was valid and had not been invalidated by subsequent events. He dismissed the charge of dangerous driving and fined the appellant £5 on the charge of driving without due care and attention to which he pleaded guilty.

The appellant appealed.

Cecil Binney for the appellant.

E. A. Machin for the respondent.

THE LORD CHIEF JUSTICE: I will ask Diplock J. to deliver the first judgment.

DIPLOCK J.: This is an appeal on case stated by Mr. Paul Bennett, a metropolitan magistrate, and the facts and point which arise in it are quite short. On February 11, 1958, the appellant took part in a traffic incident with his motor-car at Eaton Gate in London. On February 14 a notice of intended prosecution was served on the appellant, and it was in this form, headed: "Notice of Intended Prosecution. Sir, Pursuant to section 21 (*c*) of the Road Traffic Act, 1930, I am directed by the Commissioner of Police of the Metropolis to give you notice that it is intended to institute proceedings against you for the following offences: Driving a motor-vehicle in a manner dangerous to the public, driving a motor-vehicle without due care and attention, driving a motor-vehicle without reasonable consideration for other persons using the road, contrary to sections 11 and 12 of the Road Traffic Act, 1930." Then there are the particulars of the occurrence: "At about 10.50 p.m. on February 11, 1958, at Eaton Gate, S.W.1, junction Eaton Terrace," and that is signed on behalf of the superintendent of police by one J. Vaughan, police superintendent.

Some thirteen days later, on February 27, another letter was sent to the appellant. That was in the following form

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and bore the same reference number as the previous letter: "Sir, I am directed by the Commissioner of Police of the Metropolis to refer to the incident arising out of the use of motor-vehicles"—then there are their registration numbers—"on February 11, 1958, at Eaton Gate, S.W.1, junction Eaton Terrace, and to say that, after careful consideration, the police have decided not to take any further action in the matter." That was signed by one Dix, acting chief inspector of police on behalf of the superintendent. On March 13, a fortnight later, a third letter was sent to the appellant. It was addressed from New Scotland Yard, signed on behalf of the Assistant Commissioner, and was in the following terms: "Sir, I am directed by the Commissioner to refer to the letter of February 27, 1958, sent to you by the superintendent at Gerald Road Police Station, concerning an incident arising out of the use of your motor-vehicle"—then there are the particulars of the number and place—"in which letter it was said that after careful consideration the police had decided not to take any further action in the matter. I am now to say that after further consideration the Commissioner has decided to institute proceedings against you for driving in a manner dangerous to the public and for driving without due care and attention contrary to sections 11 and 12 of the Road Traffic Act, 1930." That was signed on behalf of the Assistant Commissioner.

The issue is set out in paragraph 3 of the case as follows: "It was contended by the appellant that section 21 of the Road Traffic Act, 1930, had not been complied with in that the notice of intended prosecution had been withdrawn by the letter of February 27, 1958, and the only effective notice of intended prosecution received by him was the letter dated March 13, 1958, and this was sent more than fourteen days after the commission of the offence alleged. It was contended by the respondent that the notice of intended prosecution was valid and could not be and was not in fact withdrawn." The learned magistrate's opinion was that section 21 of the Road Traffic Act had been complied with by the original notice of

intended prosecution on February 14. The appellant pleaded guilty of driving without due care, and the charge of dangerous driving was dismissed and the appellant was fined £5 and ordered to pay £5 costs.

It has been contended by Mr. Binney here that section 21 of the Act must be read with certain words implied. I think it is necessary to read the relevant part of section 21: "Where a person is prosecuted for an offence under any of the provisions of this Part of this Act relating respectively to the maximum speed at which motor-vehicles may be driven, to reckless or dangerous driving, and to careless driving he shall not be convicted unless either (*a*) he was warned at the time the offence was committed that the question of prosecuting him for an offence under some one or other of the provisions aforesaid would be taken into consideration; or (*b*) within fourteen days of the commission of the offence a summons for the offence was served on him; or (*c*) "—and this was the one relied on in this case—" within the said fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person registered as the owner of the vehicle at the time of the commission of the offence." Those three conditions are alternative.

The purpose of the section is clear and has been expressed by this court on a number of occasions, namely, that a person concerned in a traffic accident should be informed at an early stage of the intended prosecution so that he can obtain his witnesses and prepare his case. Mr. Binney has argued that paragraph (*c*) of the section must be read as containing by implication some such words as "notice of intended prosecution was served or sent by registered post to him and has not been withdrawn," or else that the effect of the second letter I have read is to nullify or cancel the effect of the first notice. A possible alternative way of putting it would be, no doubt, that as the result of the second letter the police were estopped from proceeding with the prosecution. It seems to me that in

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Mr. Binney's argument there is implicit a fundamental fallacy that only the police can prosecute for an offence of this nature. That is not so. Although in all but an infinitesimal number of cases, no doubt, information is laid and the prosecution is conducted by a particular police officer, that is not by virtue of his being a police officer, but in the exercise of the right of any member of the public to lay an information and to prosecute an offence. It therefore follows that when one looks at the three alternative conditions precedent to conviction laid down by section 21, the warning, the serving of the summons or the giving of the notice of intended prosecution, such warning may be given and such summons served or such notice given by any member of the public and not merely by a police officer; and that when such a warning has been given, summons served or notice of intended prosecution given it may be taken advantage of by anyone who wishes to prosecute. It would indeed be difficult to argue that where a person has been warned at the time of the accident under paragraph (*a*) a letter written by the police afterwards saying that they did not intend to prosecute would nullify the effect of the warning and so prevent anyone else from prosecuting for that offence. It seems to me that the same considerations apply to paragraph (*c*) and that it is impossible to read into that paragraph the words which Mr. Binney seeks to imply. It seems to me that what the paragraph requires is that a notice should be given of intended prosecution, it matters not by whom, within the period laid down by the paragraph and, once that is given, the condition precedent and the only condition precedent to a conviction is fulfilled.

It must not be thought because we have come to the conclusion that that is the construction of the Act that the habit of sending a letter to say that proceedings will not be brought and then subsequently sending a letter saying that the police have changed their mind is a practice to be commended. It is one which may lead in certain circumstances to considerable injustice to the person prosecuted; but though that may be so, it does not seem to us that we can be induced to read

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further words into the plain words of the Act. There is this also to be observed, that one of the ultimate sanctions of the rule of law in this country is the right of private persons to lay informations and bring prosecutions. If Mr. Binney's argument were right, it would be possible for the police to use a dispensing power in relation to an intended prosecution by sending a notice under paragraph (*c*) by one post and withdrawing it by the next post. This appeal is accordingly dismissed.

STREATFEILD J.: I agree, but I confess I do so with some reluctance. I base my opinion solely on the construction of this section, and it seems to me, reading the three alternative requirements together, if a policeman was on the spot when an accident took place and in fact warned an offender that the question of his prosecution would be taken into consideration, no amount of subsequent intimation that a prosecution was not going to take place would obliterate the fact that he had been warned, which is the only requirement of paragraph (*a*). In the same way, if a summons were served within fourteen days and proceedings actually commenced under (*b*), no amount of intimation that the summons was not going to be proceeded with would, as it were, undo that summons. Similarly, under paragraph (*c*) where notice has been given of intended prosecution within fourteen days, no amount of cancellation of that notice would obliterate the fact that notice was given. That upon the true construction of this section is all that is required—that either a warning should be given at the time or proceedings shall be commenced within fourteen days or a notice of intended prosecution shall be given within fourteen days. So long as one or other of those conditions precedent is fulfilled, there is no bar to a conviction. Within the four walls, therefore, of that section I agree that Mr. Binney's argument in this court must fail. At the same time when one bears in mind that the basis of the requirements of section 21 is that a person who is accused or who may be accused of an offence under section 11 or

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section 12 of the Road Traffic Act, 1930, may be given fair warning or a fair chance to prepare his defence and to call his witnesses, one sees at once that the allegation or the statement in a printed form that the police have decided not to take any further action after all, having previously given notice that they intend to, may cause an accused person to experience a sense of false security and he may allow his witnesses to disperse to the four corners of the world beyond recall. Then if the police afterwards change their minds and give him notice that they intend to prosecute after all, he may be left in the air so far as his witnesses are concerned. It may therefore be that, if that is encouraged, the purpose of section 21 may fail. I do not think that there is any question of any injustice having resulted in this case because the appellant in fact pleaded guilty to careless driving and was dealt with on that basis. Of course, some people even may be induced to plead guilty because they have not their witnesses to satisfy the court. It may well be that in this case no injustice has been done, but one can quite conceive that in future there might be a case where, if a notice of intended prosecution was given and then for all practical purposes withdrawn in plain English and then reinstated afterwards, that course would work an injustice. One can only say that one can rely, and I am sure with confidence, upon the integrity of the police and still more upon the integrity of the justices to see that no man in fact suffers injustice through it. But one can well sympathise with a man who, having been given a notice and having been served with a purported cancelling notice by precisely the same authority, then out of the blue receives another letter from the same authority, the Commissioner of Police, saying that after all he is going to prosecute; and one can well understand such a person feeling a sense of grievance. Nevertheless, in my view, on a true construction of section 21 what was done in this case was done within the four corners of the section. It is for those reasons, therefore, that I agree with the judgment of my brother Diplock.

THE LORD CHIEF JUSTICE: With some regret I have come to the same conclusion and I have nothing to add.

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Appeal dismissed.

Solicitors: Amery-Parkes & Co. for the appellant; The Solicitor, Metropolitan Police, for the respondent.

[NOTTINGHAMSHIRE QUARTER SESSIONS APPEALS COMMITTEE]

BEFORE

MR. T. R. FITZWALTER-BUTLER, CHAIRMAN

WRIGHT AND OTHERS *v.* JENKINS

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Mines and Quarries—Criminal Liability of Mine Manager—Duty of Mine Manager to Secure Safety of Working Places—Whether Duty Absolute—Mines and Quarries Act, 1954 (2 & 3 *Eliz.* 2, *c.* 70), *ss.* 48, 152.

By the Mines and Quarries Act, 1954, s. 48:

" (1) It shall be the duty of the manager of every mine to take, with respect to every road and working place in the mine, such steps by way of controlling movement of the strata in the mine and supporting the roof and sides of the road or working place as may be necessary for keeping the road or working place secure.

" (2) It shall be the duty of the manager of every mine to take such steps as may be necessary for securing that he is at all material times in possession of all information relevant for determining the nature and extent of any steps which it is requisite for him to take in order to discharge efficiently the duty imposed on him by the foregoing subsection."

A fall from the roof of a working place in a coal mine having had fatal results, the manager of the mine and other persons

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were summoned under sections 48 and 152. They were convicted and fined. They appealed to quarter sessions on the ground that there had been no contravention of section 48 (1) and the case is reported solely on the interpretation of the section.

A. P. Marshall, Q.C., and *Nigel Robinson* (instructed by Shacklock, Bosworth & Hooton, Sutton-in-Ashfield, and Rothera, Sons & Langham, Nottingham, for the appellants.

J. A. Grieves, Q.C., and *Geoffrey Lane* (instructed by Wells & Hind, Nottingham), for the respondent.

THE CHAIRMAN (T. R. FITZWALTER-BUTLER, ESQ.), in allowing the appeals, said: We feel that we must, first of all, face the difficult problem of the construction of this new Act of Parliament, and in particular section 48. Mr. Grieves has put his argument very compendiously—that, reading that section and section 152, once the prosecution has proved that a stone of appreciable dimensions which has caused injury and damage has fallen from a roof or working place, it has been proved that the place has not been kept secure, and that, once the status of the particular defendant is proved, prima facie an offence under section 152 is proved, by the standard of reasonable doubt; but then the burden shifts to the defendant to establish his defence, if he can, on the lower standard of proof; in other words, Mr. Grieves says that the liability imposed by section 48 is absolute. If we had been construing the earlier Acts, in our view Mr. Grieves would undoubtedly have been right; but we are approaching a new Act, and Mr. Marshall says that different considerations apply to the construction of this section. In our view, Mr. Marshall is right. In our view, although a high duty is imposed on a manager of a mine by section 48, it is not an absolute duty.

There are three matters which lead us to this conclusion. First of all, section 48 uses different language from that of the corresponding sections in earlier Acts, and we think that has been done for a purpose. If the duty was already absolute, as

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it undoubtedly was, it obviously cannot be made higher; if the duty was to remain the same, there would be no necessity for using different words; but, if it were desired to diminish the duty, then, in our view, the use of different language would be appropriate. Secondly, there is introduced for the first time into this section a new element, namely, control of movement of strata. That is an element into which unknown factors must, to some degree, enter; and that consideration also, we think, must be borne in mind. Thirdly, as has been pointed out by Mr. Marshall, there are other sections in this Act where an absolute duty is obviously created and where language of a different kind is used.

In our view, the duty imposed on a manager by this section is to take such steps as a competent manager, in the light of his own experience and in the light of generally accepted mining practice, would have taken. If he fails to take any of those steps, he is guilty of an offence under the section. To put it in other words, the test of foreseeability is introduced. It is, of course, not an answer to a manager to say: "I personally did not foresee the particular danger that arose"; but there is a test of foreseeability, and the element of *mens rea* to that extent enters into the section. We are fortified in that view by the dictum of Lord Goddard C.J. in the case of HARDING *v.* PRICE [1948] 1 K.B. 695, at p. 701, where he deals with the element of *mens rea* in criminal statutes and draws a distinction between a section which imposes a duty and a section which prohibits a course of conduct. We are further fortified by the fact that, in the most recent case on *mens rea*, that of THE QUEEN *v.* ST. MARGARET'S TRUST, LTD. (1958) 42 Cr.App.R. 183, HARDING *v.* PRICE was referred to, and there is nothing in the judgment in the later case which in any way dissents from that dictum of Lord Goddard.

Further, we take the view that the proper construction of the word "secure" is that adopted by McNair J., when he was sitting as a member of the Court of Appeal, in the case of GOUGH *v.* NATIONAL COAL BOARD [1958] 1 All E.R. 754, where he says that "secure" imports "a physical condition

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of stability which will ordinarily result in safety." We further come to the conclusion, in construing this section, that the duty laid on the manager by the section is a personal duty.

[Reported by P. G. HUGHES, Barrister-at-Law]

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE STREATFEILD AND MR. JUSTICE DIPLOCK

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R. *v.* LLOYD-JONES AND ANOTHER; *Ex parte* THOMAS

Process to Secure Appearance — Quarter Sessions — Committal for Sentence—Prisoner Released on Bail Pending Appeal against Conviction by Magistrates — Failure to Appear — Power of Recorder and Assistant Recorder to Issue Bench Warrant— Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *ss.* 21 (6), 29 (3).

Where a prisoner has been committed to quarter sessions for sentence under section 29 of the Magistrates' Courts Act, 1952, and has been admitted to bail pending an appeal against his conviction by the magistrates and fails to appear at quarter sessions, a Recorder or Assistant Recorder has power, by virtue of section 29 (3) of the Criminal Justice Act, 1948, to issue a bench warrant for his arrest.

Application for mandamus.

On April 18, 1958, John Charles Platt was convicted at Cardiff City Magistrates' Court on three charges of larceny and was committed to Cardiff Quarter Sessions for sentence

under section 29 of the Magistrates' Courts Act, 1952. He gave notice of his intention to appeal against conviction, and in June, 1958, was granted bail by Ashworth J., the judge in Chambers, conditional on his reporting daily to the police. On August 14, 1958, his appeal came on before quarter sessions. He did not appear or surrender to his bail and the appeal was dismissed. The Assistant Recorder (F. Elwyn Jones, Esq., Q.C.) was asked to issue a bench warrant for the prisoner's arrest, but felt that in all the circumstances he had no power to do so. The Chief Constable of Cardiff, William Francis Thomas, obtained leave to apply for an order of mandamus directed to the Recorder, H. V. Lloyd-Jones, Esq., Q.C., and the Assistant Recorder, requiring the issue of a bench warrant.

J. F. E. Stephenson for the applicant.

The respondents did not appear and were not represented.

The Lord Chief Justice: In this case counsel moves on behalf of the Chief Constable of the Cardiff City Police Force for an order of mandamus directed to the Recorder of the City of Cardiff to issue a bench warrant for the arrest of John Charles Platt.

The short facts are these: On April 18, 1958, Platt was convicted before the magistrates' court on three charges of larceny, and he was committed to the next quarter sessions for the City of Cardiff for sentence under section 29 of the Magistrates' Courts Act, 1952. The prisoner then gave notice of his intention to appeal against conviction, and he was in June granted bail by Ashworth J., in London, conditional on his reporting daily to the police, bail being in his own recognisance in the sum of £20. On August 14, 1958, his appeal came on before quarter sessions, but he did not appear or surrender to his bail and in due course his appeal was dismissed. Thereupon it became the duty of the Assistant Recorder to consider the question of sentence. He was asked to issue a bench warrant for the prisoner's arrest, and one does

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not blame him in the slightest because he felt that in all the circumstances he had no power to do so. The applicant then came before the judge in Chambers in London, who again said that he did not think he had power to issue the warrant and, in those circumstances, the matter has come before this court.

It seems clear that somebody ought to have power and especially the person seised of the matter before whose court the case came, namely, the Recorder of the City of Cardiff, but the question is whether he has. For myself, I do not at the moment see why any court seised of a matter should not have power to issue a warrant in circumstances such as these where a prisoner fails to surrender to his bail. One would think that the position was that every court would have inherent power to do so, but, as far as I can see, the matter has not quite proceeded on those lines, for, if one looks at p. 71 of Archbold's *Criminal Pleading*, etc., 33rd ed., it would appear that it has been the practice " that any court of record before which an indictment is preferred and signed may forthwith issue a bench warrant," and the passage goes on: " Where a party against whom the indictment has been preferred and signed is already under recognisance to appear and answer any indictment that may be preferred against him, and he does not appear, the prosecutor may bespeak a bench warrant, which will be signed by the justices at the close of the sessions," and the form of bench warrant calls upon " AB who stands indicted before us to appear to answer the said indictment." If one turns to magistrates' courts, one finds that apparently there was doubt for a considerable time whether magistrates had power to issue a warrant, and indeed by section 67 of the Criminal Justice Act, 1948, they were given express power to do so, that section being now replaced by section 97 of the Magistrates' Courts Act, 1952. Still, whatever the position may be with regard to inherent powers, in my judgment there is sufficient ground to be found in the Act of 1948 itself to say that the Recorder in such circumstances has power. It will be observed that by section 29 (3)

of the Act of 1948 it is provided: "Where an offender is so committed for sentence as aforesaid, the following provisions shall have effect, that is to say: (*a*) the appeal committee or court of quarter sessions shall inquire into the circumstances of the case, and shall have power to deal with the offender in any manner in which he could be dealt with by a court of quarter sessions before which he had just been convicted of the offence on indictment; . . ." I think it is clear from that subsection that when quarter sessions begin to inquire into the matter with a view to dealing with the offender they are put in the same position as if the offender had just been convicted before them on indictment. Indeed, in the two cases to which we have been referred, BROWES (1949) 33 Cr.App.R. 164 and GRANT (1951) 34 Cr.App.R. 230; [1951] 1 K.B. 500, the Court of Criminal Appeal said that where section 29 (3) (*a*) speaks of the prisoner being treated as if he had just been convicted on indictment, that would be so for the purposes of making an order under section 22 (1) for supervision, which can only be made on indictment, and also for the purposes of the service of notices under section 23, which provides that the notice must be served at least three days before the trial. The court held that three days before the trial in circumstances such as these meant three days before the hearing at which quarter sessions would be dealing with the matter as if they had just convicted on trial on indictment. Finally, it is to be observed that by section 21 (6) a person who has been convicted of a summary offence and then sentenced by a court of quarter sessions is to be treated as if he had been convicted of that offence on indictment. For my part, I think that is enough for us to say that in a case such as this the Recorder has power to issue a bench warrant. After all, if one looks upon the matter in this way, that he is to be treated as if he has just tried the prisoner and the prisoner has been convicted on indictment, if after the midday adjournment the prisoner had absconded the Recorder, before sentencing him, could on those very words have him brought up on a bench warrant. I think

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myself the Recorder had power and that this order of mandamus should issue to him.

STREATFEILD J. I agree.

DIPLOCK J. I agree.

Order for mandamus.

Solicitors: Theodore Goddard & Co., agents for The Town Clerk, Cardiff.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND MR. JUSTICE DIPLOCK

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GEORGE ALBERT GOODALL

Bankruptcy Offence—Obtaining of Credit—Conversion of Building into Flats—Sums Paid in Advance by Prospective Tenants—Negotiations Conducted by Defendant—Payments by Cheque to Defendant's Wife or Firm Owned by Her—No Clear Evidence of Obtaining of Credit by Defendant—Issue Not Left to Jury—Bankruptcy Act, 1914 (*4 & 5 Geo. 5, c. 59*), *s.* 155.

The appellant was an undischarged bankrupt and his wife was the leaseholder of certain premises which were intended to be converted into flats, and the registered proprietor of a firm of builders, of which the appellant was manager. The appellant interviewed three prospective tenants and told them that if they wanted tenancies from his wife they would have to pay in advance the cost of conversion. As a result substantial sums were paid by these three persons by cheques made out either to the appellant's wife or the firm of which she was the proprietor. The negotiations had throughout been conducted by the appellant. The appellant was convicted on counts charging him with obtaining credit in respect of these

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sums without disclosing that he was an undischarged bankrupt, contrary to section 155 of the Bankruptcy Act, 1914.

Held, that the conviction on these counts must be quashed, as the jury had never been asked to decide whether, if credit was obtained, it was obtained from the appellant or from his wife or from the firm of which she was proprietor, and there was no clear evidence that the appellant had obtained credit at all himself.

Quaere whether the receipt of money on a promise of delivery of goods or rendering of services in the future amounts to the obtaining of credit under the Bankruptcy Act, 1914.

INGRAM, 40 Cr.App.R. 115; [1956] 2 Q.B. 424 referred to.

Appeal against conviction.

The appellant was convicted at the County of London Sessions on May 15, 1958, of attempting to obtain £38 from the War Damage Commission by false pretences and was sentenced by the Deputy-Chairman to nine months' imprisonment. He did not appeal against this conviction or sentence. He was also convicted on five counts of obtaining credit without disclosing that he was an undischarged bankrupt, and on these he was sentenced to a further term of twelve months' imprisonment, consecutive to the sentence for false pretences.

The appellant was an undischarged bankrupt and in 1956 his wife became the leaseholder of premises at Westfall Road, Streatham, which they were minded to convert into three flats. The appellant's wife was also the registered proprietor of the firm of builders which were to do the conversion, and the appellant was the manager of this firm. Advertisements were inserted in newspapers and eventually three persons became interested. The appellant told them that if they wanted tenancies from his wife they would have to pay in advance the cost of conversion. As a result £480, £400 and £345 was paid by the prospective tenants in advance by cheques made payable either to the appellant's wife or the firm to defray the cost of conversion and it was these amounts which formed the subject of the charges.

F. R. Lewis-Heath for the appellant. It is conceded that INGRAM, 40 Cr.App.R. 112; [1956] 2 Q.B. 424 is a strong

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authority for the proposition that the receipt of money on a promise to supply goods or render services in the future can amount to the obtaining of credit. That, however, was a decision not under the Bankruptcy Acts, but under section 13 of the Debtors Act, 1869, where the language is different and different considerations apply. The only case which has arisen under the Bankruptcy Acts on this point appears to be OSBORN *v.* BARTON (1950) 66 T.L.R. (Pt. 1) 115, where the position was left much less clear, and where there could not on the facts have been any obtaining of credit. The proper construction of " credit " in sections under the Bankruptcy Acts appears, therefore, still to be open. Even, however, if the Deputy-Chairman was right in holding that there had been an obtaining of credit in this case, the issue of who the person was who had obtained credit should have been left to the jury. The evidence was at least as consistent with credit having been given to the appellant's wife, or to the firm of which she was the registered proprietor, as all the relevant cheques were made payable to one or other of these persons, and not to the appellant. The jury were never directed, as they should have been, to consider this aspect of the case, and the summing up was, therefore, defective on this point.

S. A. Morton for the Crown. Counsel in the court below did not seek to contend that, if credit had been obtained, it had been obtained by anyone other than the appellant, and in view of the fact that the appellant had conducted all the negotiations and held himself out as the builder, there was substantial evidence to support the view that he should be regarded as having obtained credit.

THE LORD CHIEF JUSTICE [after stating the facts as set out above]: There is one point of law which immediately arises here, namely, whether if a man obtains money on the faith of a promise to supply goods or render services in the future he is obtaining credit within the meaning of the Bankruptcy Act, 1914. The ordinary case of obtaining credit, no doubt, is the case where goods are supplied to or services rendered for

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a man and he is given time to pay. It was contended here, and so held by the learned Deputy-Chairman, that the receipt of money on a promise to make a future rendering of services was obtaining credit. The matter is one which, in the view of this court, will one day have to be looked at with very great care. The position appears to be that in LAKER (1949) 34 Cr.App.R. 36—a case not under this section—it was decided by this court that money given to a man on his promise to use it to obtain goods could not amount to obtaining credit. On the other hand, in OSBORN *v.* BARTON (1950) 66 T.L.R. (Pt. 1) 115, it was decided by the Divisional Court that money obtained on a promise to make an immediate delivery of goods was not an obtaining of credit, and from that the inference is that if the promise had been to supply the goods not by return of post but at a future date, credit might well have been obtained within the meaning of this section. Finally, in INGRAM, 40 Cr.App.R. 115; [1956] 2 K.B. 424, it was held that for the purposes of section 13 of the Debtors Act, 1869, credit could be obtained in incurring a liability to pay not merely money but also money's worth, which would cover the delivery of goods or the rendering of services. Under that section the offence consists of obtaining credit in incurring a debt or liability, and the court in that case, basing themselves on those alternatives, debt or liability, coupled with the definition of "liability" in section 31 of the Bankruptcy Act, 1869 (*supra*), held that obtaining money on a promise to deliver goods or render services would amount to obtaining credit. The court is of opinion that at some time those cases will have to be looked at with very great care, but in the present case we find it unnecessary, because on the facts of this case we are not satisfied that it could be said that the appellant obtained credit at all.

If credit was obtained, it may well have been by the appellant's wife or G. D. Builders, Ltd. His wife was the leaseholder of the premises and also the registered proprietor of a firm of builders known as G. D. Builders, Ltd., of which firm the appellant was manager. The negotiations with the

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prospective tenants were, apparently, conducted by the appellant, and there is no doubt that he, if I may put it in that way, held himself out as the builder. It appears that he said to one or more of these prospective tenants: "I am the builder. I shall need the money to pay wages and buy materials. I must have the costs of conversion in advance." The money, the subject of these counts, which was paid over was all paid over by cheque and the cheques were in fact made out either to the wife or G. D. Builders, Ltd., and there is no question of any fraud in this case. All that money went quite properly into the wife's account. After the evidence had been called and after legal arguments, the Deputy-Chairman consulted counsel on their views on the matter and on what would remain to be left to the jury, assuming that this was a case of obtaining credit at all. He asked counsel for the prosecution: "If I hold the view that in law the defendant, upon what he admitted he did, was obtaining credit, and has admitted he never told anyone that he was an undischarged bankrupt, the offence is complete?", and counsel agreed. Later when he called on counsel for the defence, who was not the counsel who has appeared for the appellant here, counsel replied: "Before I start, I must say I am in perfect agreement with your Lordship. If the law as I interpret it is wrong, your Lordship has no alternative, from the nature of the examination which I led, but to direct the jury to convict." Accordingly, the jury were directed that the offence in law was made out and that it was their duty to convict upon it.

In the view of this court, that admission by counsel for the defence ought never to have been made. It seems to us on the facts of this case that at the very least it ought to have been left to the jury to say whether the appellant obtained credit rather than G. D. Builders, Ltd., or his wife. It is not necessary for us to go so far as to say that there was no case of obtaining credit as against the appellant, but the matter certainly was one which, in our opinion, ought to have been left to the jury. In these circumstances, this court has no

alternative but to quash the conviction of the appellant on the five counts of obtaining credit without disclosing the fact that he was an undischarged bankrupt.

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Conviction quashed in part.

[CENTRAL CRIMINAL COURT CASE]

BEFORE

MR. COMMISSIONER MAUDE

R. *v.* HALL AND OTHERS

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Evidence—Written Statement of Prosecution Witness to Police—Right of Defence to Inspect.

Observations on the right of the defence to inspect a written statement made to the police by a prosecution witness.

Trial at the Central Criminal Court.

On November 12, 13 and 14, 1958, at the Central Criminal Court, in the trial of Hall, Bassey, Richards and Smith, before the Commissioner (Judge Maude, Q.C.), Hall and Smith were charged with assaulting a peace officer in the execution of his duty, and Hall, Bassey and Richards with causing grievous bodily harm with intent and assault occasioning actual bodily harm.

On November 12, before the jury was sworn, *M. D. L. Worsley*, counsel for Bassey, applied to the judge to be allowed to see the statements made by certain prosecution witnesses to the police, and cited CLARKE (1930) 22 Cr.App.R. 58 at pp. 60, 65, and the Criminal Procedure Act, 1865, s. 5. The application was refused.

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Mr. Commissioner Maude

On November 13 counsel for Bassey renewed the application and cited: a reference to XINARIS in [1955] *Criminal Law Review* 587; a note of counsel of MCCLEAN AND MCGING (unreported), a case of robbery tried on April 22, 1955, at the Central Criminal Court by Judge Maude, Q.C., in which XINARIS (*supra*) was cited and Judge Maude ruled that the prosecution should allow counsel for the defence to inspect a statement of a prosecution witness to the police; BRYANT AND DICKSON (1945) 31 Cr.App.R. 146.

On the said renewed application Judge Maude, *saying that he was laying down no general rule*, ruled that the prosecution should allow counsel for the defence to inspect the statements of certain prosecution witnesses to the police.

[A note of the portion of the transcript in XINARIS, in which Byrne J. gave the ruling referred to, is appended.]

NOTE

Michael Demetris Xinaris was tried at the Central Criminal Court by Byrne J. and a jury, on April 21, 1955, for the murder of James Frederick Robinson. On the first day of the trial the prosecution called one Rudolph Farace to give evidence. Immediately after the conclusion of Farace's examination-in-chief the following events took place.

T. Christmas Humphreys, *Mervyn Griffith-Jones* and *Miss J. Southworth* for the Crown.

E. L. Mallalieu, Q.C., and *J. Yahuda* for the defence.

Mallalieu: Farace, did you make a statement to the police?

Farace: Yes.

Mallalieu: When was that?

Farace: On a Sunday—Saturday night.

Mallalieu: The night after this happened?

Farace: Yes.

Mallalieu: My Lord, I wonder if I might have this statement for inspection?

Byrne J.: Yes.

Humphreys: Is it your Lordship's ruling he may see the original?

Byrne J.: Yes, I think so.

Humphreys: If your Lordship pleases.

Mallalieu: I am very grateful to your Lordship.

Whereupon Mr. Humphreys handed over to the defence copies of the statements made to the police by all the witnesses for the prosecution.

Solicitors: Director of Public Prosecutions for the Crown; A. W. Kemp for Xinaris.

[The Editor is indebted to M. D. L. Worsley, Esq., and Joseph Yahuda, Esq., for the preparation of this report.]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND MR. JUSTICE DIPLOCK

JAMES AYU

Sentence — Binding Over — Condition that Offender should Leave and Remain out of England — Distinction between Common Law Binding Over and Binding Over under the Justice of the Peace Act, 1361.

Though a condition that the offender should leave England forthwith and not return for a specified period can properly be inserted in an order of binding over to come up for judgment if called upon made in lieu of sentence, such a condition cannot be inserted in an order of binding over under the Justice of the Peace Act, 1361.

Where, therefore, the appellant had been sentenced as an incorrigible rogue to twelve months' imprisonment (the maximum term permissible) and had been further ordered to enter into a recognisance at the end of any imprisonment which he might undergo or at such earlier date as the Home Secretary might direct to accompany an escort to transport to Nigeria and not to land again in this country for five years thereafter and, in default of entering into such recognisance, to be imprisoned for a further six months,

Held, that the order was invalid and must be quashed.

McCARTAN (1958) 42 Cr.App.R. 262 distinguished.

Appeal against sentence.

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Parker L.C.J., Cassels J., Diplock J.

The appellant was convicted at Brighton Magistrates' Court of being found in a dwelling-house for an unlawful purpose and was committed to Brighton Quarter Sessions as an incorrigible rogue. On September 24, 1958, he was sentenced by the Recorder (C. J. Doughty, Esq., Q.C.) to twelve months' imprisonment and an order was made "that at the end of any imprisonment which he may undergo or at such earlier date as the Home Secretary may direct he is bound over in his own recognisance in the sum of £10 to accompany an escort to the train, boat or aeroplane where he will be sent to Nigeria as soon as arrangements can be made and that he does not land again in this country for a period of five years thereafter. In default of his so entering into such recognisance he will be imprisoned for six months."

M. D. L. Worsley, for the appellant, was not called on.

C. J. T. Pensotti, for the Crown: The condition approved by the Court of Criminal Appeal in McCARTAN (1958) 42 Cr. App.R. 262 can be attached also to the order made in this case; it is a matter for the discretion of the court. [He referred also to R. *v.* COUNTY OF LONDON SESSIONS, *ex p.* BEAUMONT [1951] 1 K.B. 557.]

THE LORD CHIEF JUSTICE: This appellant was convicted at a magistrates' court at Brighton of being found in a dwelling-house for an unlawful purpose and was committed to quarter sessions for sentence as an incorrigible rogue. At Brighton Borough Sessions he was sentenced by the recorder to twelve months' imprisonment and an order was made "that at the end of any imprisonment which he may undergo or at such earlier date as the Home Secretary may direct he is bound over in his own recognisance in the sum of £10 to accompany an escort to the train, boat or aeroplane where he will be sent to Nigeria as soon as arrangements can be made and that he does not land again in this country for a period of five years thereafter. In default of his so entering into such recognisance he will be imprisoned for six months."

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The appellant is apparently a native of Lagos. He came to this country in 1939 and had various jobs, but since 1948 he has done no regular work whatsoever. He has had some sixteen convictions, for most of which he has been given short sentences of imprisonment varying from one month to two years, and he has already, before these proceedings, been found to be an incorrigible rogue, in October, 1957, and sentenced to twelve months' imprisonment.

Quite clearly if it is possible to make an order imposing a condition that he goes back to his country and stays there, so much the better, but the whole question is whether there is any power to make such an order. It seems clear that this is possible and, indeed, it has been done, in the case of an order binding a man over to come up for judgment when called upon. That is a binding over to keep the peace and come up when called upon, made in lieu of sentence. Such a condition has been imposed in one or two cases and approved by this court, but we know of no case where it has been held that such a condition can be inserted in a binding over order under the Justice of the Peace Act, 1361. Indeed, when one comes to think of it, it would be rather startling if the jurisdiction which can be exercised by a single magistrate to bind over under that Act could be made on conditions of any sort.

The learned Recorder here went into the matter with very great care, and he was minded, if he could, to make this order. As I understand it, he was anxious that the case should come before this court to see whether it could be done. It may be that he was to some extent misled by the report of the case of McCARTAN (1958) 42 Cr.App.R. 262. That was a case which had been referred to the Court of Criminal Appeal under section 19 (*b*) of the Criminal Appeal Act, 1907, by the Home Secretary. The real question there upon which the advice of the court was sought was whether it was possible to make it a condition of a probation order that a man should leave the country and go, in that case, to Northern Ireland, and the court, after saying that they were clearly of opinion that no such condition could be made in a probation order, did

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go on to say it could be made a condition of a binding over. Lord Goddard (1958) 42 Cr.App.R. at p. 265, quoted the words which he had used in FLAHERTY, an unreported case, decided in June, 1958: "I then called on the boy and said: 'The court is going to bind you over in your own recognisance in the sum of £10 that you accompany an escort to the train, where you will be sent to Eire tonight or as soon as arrangements can be made, and you must not land again in this country for at least three years.'" On the face of that it might be thought that a condition was being inserted in a binding over under the Act, but, when one looks at the record, it is quite clear that the order made in that case was an order made after the sentence had been quashed providing that the appellant was to come up when called upon for judgment, and, in effect, by way of condition saying: "You will not be called up for judgment if you go to Eire and reside there for three years without coming back." That form of order, a binding over to come up for judgment when called upon, could not be made in this case in addition to the twelve months' imprisonment, and there being no power to make that condition part of a binding over under the Act which the Recorder could make as a magistrate, the order he made must be quashed, leaving the sentence on the appellant as the sentence of twelve months' imprisonment. I should add that this case shows very clearly the need which has already been canvassed, I understand, in other quarters for there being power to deport a man such as the appellant.

Sentence reduced.

Solicitor: Town Clerk, Brighton, for the Crown.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE STREATFEILD AND MR. JUSTICE DIPLOCK

DIRECTOR OF PUBLIC PROSECUTIONS *v.* NIESER

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Receiving Stolen Goods—Property Obtained under Circumstances Amounting to Felony or Misdemeanour—Necessity of Proof of Knowledge that Property Fell into that Category—Proof of Knowledge of Specific Felony or Misdemeanour Unnecessary—Recent Possession — Evidence of Other Stolen Property in Prisoner's Possession or Previous Conviction for Dishonesty—Applicability only to Charge of Receiving Stolen Property—Larceny Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *ss.* 33 (1), 43 (1).

Where a prisoner is charged with receiving property obtained under circumstances which amount to misdemeanour, it is sufficient to charge and prove that the receiver knew that the property fell into the general category of property obtained under circumstances amounting to misdemeanour, and it is unnecessary to prove that he knew that it was obtained under circumstances amounting in law to the precise misdemeanour by which it was in fact obtained. It is not sufficient merely to prove that the prisoner knew that the property fell into the wider category of property dishonestly obtained. Similar principles apply where the charge is that of receiving property obtained under circumstances amounting to felony. If a prisoner charged with receiving property obtained under circumstances amounting to misdemeanour believed that the property was in fact stolen or obtained under circumstances amounting to felony, he would be entitled to be acquitted.

Evidence admissible under section 43 (1) of the Larceny Act, 1916, to prove guilty knowledge, namely, that other stolen property had previously been found in the prisoner's possession or that the prisoner had previously been convicted of dishonesty, is admissible only on a charge of receiving *stolen* property; it is not admissible on a charge of receiving property obtained under circumstances amounting to felony.

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Case stated by Middlesex justices.

Two informations were preferred at Edmonton Magistrates' Court by the appellant, the Director of Public Prosecutions, against the respondent, Brian Douglas Nieser. The first charged the respondent with receiving in June, 1956, a refrigerator to the value of £54, knowing it to have been obtained under circumstances amounting to a misdemeanour, namely, by false pretences, contrary to section 33 of the Larceny Act, 1916, and the second with receiving in August, 1956, a television set to the value of £71, knowing it to have been obtained under circumstances amounting to a misdemeanour under section 13 (1) of the Debtors Act, 1869, namely, in incurring a debt or liability, obtaining credit by means of false pretences or by means of other fraud, contrary to section 33 of the Larceny Act, 1916. The respondent elected to be tried summarily and pleaded Not Guilty. Evidence was given by a Mrs. Honey that she had obtained the refrigerator by false pretences and the television set by obtaining credit under false pretences, each having in fact been obtained under a credit sale agreement. She also gave evidence of the value of the articles, which were worth £58 10s. and £90 6s. respectively, and described the circumstances in which she sold them, almost immediately after obtaining them, to the respondent. The only other evidence for the prosecution was that of a police officer who had interviewed the respondent on two occasions over a year later, had found the articles on the respondent's premises and had taken a statement from the respondent. At the close of the case for the prosecution the respondent submitted that there was no case to answer on either information.

The justices were of opinion that there was some evidence that the respondent knew, at the time when he received them, that the goods had been obtained by some dishonest means, but that there was no evidence that the respondent knew (a) that it was by false pretences that Mrs. Honey had obtained the refrigerator and (b) that it was while getting credit by fraud that she had obtained the television set. They

accordingly found that there was no case to answer on either information, and dismissed both informations. The prosecutor appealed.

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J. H. Buzzard for the appellant.
W. M. F. Hudson for the respondent.

Cur. adv. vult.

November 21, 1958. The judgment of the court was delivered by

DIPLOCK J. This is an appeal by way of case stated from a decision of the justices for the Petty Sessional Division of Edmonton on May 2, 1958, when they dismissed two informations laid by the appellant against the respondent, alleging certain offences against section 33 (1) of the Larceny Act, 1916. The court reserved judgment, because, in the course of argument, there emerged an important question of principle with regard to the essential ingredients of the offence or offences created by section 33 (1) of the Larceny Act, 1916, which does not appear so far to have been judicially decided, and which is particularly important in an age when transactions by way of credit sale agreements are becoming increasingly common.

The respondent was charged before the justices upon two informations in the following terms: "On a day unknown between the 12th day of June, 1956, and the 30th day of June, 1956, at Tottenham, received a 'Morphy Richards' refrigerator to the value of £54, knowing it to have been obtained under circumstances amounting to a misdemeanour, that is by false pretences, contrary to section 33 of the Larceny Act, 1916, and (2) On a day unknown between the 18th day of August, 1956, and the 31st day of August, 1956, received a 'Sobell' television set to the value of £71 10s. 0d., knowing it to have been obtained under circumstances amounting to a misdemeanour under section 13 (1) of the Debtors Act, 1869, that is in incurring a debt or liability, obtaining credit under

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false pretences or by means of other fraud, contrary to section 33 of the Larceny Act, 1916." He elected to be tried summarily and pleaded Not Guilty. Evidence was given by a Mrs. Honey that she had obtained the refrigerator referred to in the first information by false pretences, and the television set referred to in the second information by obtaining credit under false pretences in incurring a debt or liability. Each was in fact obtained under a credit sale agreement. She also gave evidence of the true value of the two articles in question, which were worth £58 10s. 0d. and £90 6s. 0d. respectively, and described the circumstances under which she sold them, almost immediately after obtaining them, to the respondent, who paid her £25 and £35 respectively. The only other evidence for the prosecution was that of a police officer who had interviewed the respondent on two occasions over a year later, and had found the refrigerator and television set at the respondent's premises. He also produced a signed statement by the respondent in which he denied having bought anything from Mrs. Honey except the television set, for which he said he had paid £40.

At the end of the prosecution's case the respondent's counsel submitted that there was no case to answer. The submission was on two grounds, one of which applied to the second information only, and was abandoned in this court. It is sufficient to say that it was based on a misunderstanding of the decision in SCHWELLER (1924) 18 Cr.App.R. 52, which found some support in a passage in former editions of Archbold which has been deleted in the most recent edition. The second ground of submission applied to both informations and was based upon the contention that, to sustain a charge of receiving property knowing it to have been obtained under circumstances amounting to a misdemeanour which is specified in the charge, it is necessary for the prosecution to prove that the accused knew that the property had been obtained by the misdemeanour so specified and not in some other albeit criminally dishonest way.

It was contended by counsel for the Crown that just as in

a charge of receiving stolen goods knowing them to have been stolen it is unnecessary for the prosecution to prove that the accused knew of the details or even the particular form of the stealing, but it is sufficient to prove that the accused knew that the property had been stolen generally, so, by analogy, in a charge of receiving property knowing that it has been obtained under circumstances amounting to a misdemeanour, it is unnecessary for the prosecution to prove more than that the accused knew of the circumstances amounting to a misdemeanour generally, without showing that he knew of the particular misdemeanour. He conceded that in a charge of receiving property knowing it to have been obtained under circumstances amounting to misdemeanour it would be insufficient, and indeed would be an effective defence, if it were shown that the accused believed, although erroneously, that the goods had been stolen; but he contended that under the " doctrine of recent possession " which, on the evidence was applicable to this case, the justices were entitled to infer that the accused knew the true facts relating to the circumstances in which the goods were unlawfully obtained by Mrs. Honey.

The justices accepted the respondent's submission as correctly stating the law. Paragraphs 6 and 7 of the case read as follows: " We were of opinion that Mrs. Honey had obtained the refrigerator and the television set in circumstances which amounted to the misdemeanours alleged in the informations and that the respondent had bought them from her. We were further of opinion that from the evidence as to the prices paid by the respondent, his statement that he did not bother about receipts, his signed statement that he had bought nothing other than the television set from Mrs. Honey, and his other statements and conduct on September 13, 1957, when seen by the police, there was some evidence that he knew, at the time that he received them, that the goods had been obtained by some dishonest means. We were, however, of opinion that there was no evidence that the respondent knew (a) that it was by false pretences that Mrs. Honey had

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obtained the refrigerator, and (b) that it was while getting credit by fraud that Mrs. Honey had obtained the television set. We accordingly found that there was no case to answer on either information. We therefore dismissed both informations and discharged the respondent."

The question of law put for the consideration of this court is whether the justices were correct in holding that there was no case to answer on either information. This involves two questions: (a) What knowledge of the circumstances under which property was criminally obtained by a third person must be shown to have been possessed by the accused in order that an offence of receiving property obtained under circumstances which amount to misdemeanour, contrary to section 33 (1) of the Larceny Act, 1916, may be made out? (b) Was there any evidence in this case which would have entitled a jury to find that he in fact possessed that knowledge? The answer to the first question depends upon the true construction of section 33 (1) of the Larceny Act, 1916, which is in the following terms: "Every person who receives any property knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour shall be guilty of an offence of a like degree (whether felony or misdemeanour) and on conviction thereof liable (*a*) in the case of felony to imprisonment for a term not exceeding fourteen years, (*b*) in the case of misdemeanour to imprisonment for a term not exceeding seven years."

This phraseology contains two ellipses. The nature of the first of these is apparent in comparing the language of the subsection with that of subsection (4) of the same section which deals with very similar offences. Subsection (1) speaks of "any property." It is only the presence of the word "knowing" followed by a statement of the facts known which connotes that these facts are true and thus by implication qualifies the generality of the expression "any property" by limiting it to "property which has been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour." The first part of the subsection

expanded to fill these ellipses would thus read: "Every person who receives any property (which has been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour) knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour shall be guilty of an offence . . ." Pausing at this point it is relevant to observe that the phrase "under circumstances which amount to felony or misdemeanour" must qualify the participle "stolen" as well as "obtained," for some stealing is neither felony nor misdemeanour, but a summary offence only. Receiving goods stolen under circumstances which amount to a summary offence is excluded from the subsection; it is dealt with separately by an unrepealed section 97 of the Larceny Act, 1861. This construction of subsection (1) is reinforced by comparing its wording with the less elliptical wording of subsection (4), which refers to "property so stolen or obtained" and not to "property stolen or so obtained."

The second ellipsis is to be found in the words "guilty of an offence of a like degree (whether felony or misdemeanour)." The offence to which that committed by the receiver is to be "of the like degree (whether felony or misdemeanour)" is an offence other than that of which the receiver is himself guilty and must be the only other offence alluded to in the subsection. It is tempting, having filled the first ellipsis, to say that this offence is the actual offence committed by the person by whom the property was in fact stolen or obtained irrespective of whether its degree was known to the receiver; but this we think would be fallacious, since the only express allusion to another offence contained in the subsection is to the offence "known" by the receiver to have been committed.

Subsection (1) expanded to fill the two ellipses thus reads "Every person who receives any property [which has been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour] knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour shall

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be guilty of an offence of the like degree (whether felony or misdemeanour) [as the degree of offence known by such person to have been committed by the person by whom such property was stolen or obtained] and on conviction thereof liable (*a*) in the case of felony to imprisonment for any term not exceeding fourteen years, (*b*) in the case of misdemeanour to imprisonment for any term not exceeding seven years."

The subsection thus creates two classes of offence, one a felony the other a misdemeanour, according to the circumstances in which the property received was stolen or obtained. It treats property as falling into two classes: (1) property which has been stolen or obtained in any way whatsoever under circumstances which amount to felony, and (2) property which has been stolen or obtained in any way whatsoever under circumstances amounting to misdemeanour, and it requires as an ingredient of the offence knowledge by the receiver of at least the category into which the property he has received falls.

Does it require more specific knowledge by the receiver than this of the nature of the offence committed by the person by whom the property was stolen or obtained? Neither the structure of the subsection itself nor its antecedent legal history compels us to such a conclusion. At common law the offence of receiving was a misdemeanour and was limited to cases of property which was stolen. There is ample authority that in cases of stolen goods, which are by far the most frequent subject of receiving charges, it is unnecessary to prove detailed knowledge by the receiver of the circumstances of the original taking, and this was so not only at common law, but also under the Larceny Act, 1861, and is still so under the present subsection. The Larceny Act, 1861, created by section 91 the offence of felonious receiving, limiting it to cases of property which had been and was known by the receiver to have been obtained (whether by stealing or not) under circumstances which amounted to felony at common law or under that Act. By a separate section, section 95, a new misdemeanour was created of receiving property which

had been and was known by the receiver to have been obtained (whether by stealing or not) under circumstances which amounted to misdemeanour under the Act of 1861. Under the law as it stood between 1861 and 1916 there were thus two separate statutory offences chargeable under different sections of the Act of 1861 and a common law misdemeanour of receiving stolen property the stealing of which was not a felony either at common law or under the Act of 1861. It is, we think, plain from the wording of sections 91 and 95 of the Act of 1861 first, that to constitute the offence of felonious receiving it was necessary to show that the receiver knew that the property received had been feloniously obtained and that to constitute the statutory misdemeanour of receiving the receiver knew that the property had been obtained under circumstances amounting to a misdemeanour, and secondly, that it was sufficient in either case to show that he knew that the property came within the general category of property with which the respective sections dealt; it was not necessary to show that he knew by what specific felony or by what specific misdemeanour the property had been obtained. We think that subsection (1) of section 33 of the Larceny Act, 1916, did no more than to re-enact in a single section provisions corresponding to those of sections 91 and 95 of the Larceny Act, 1861.

We are, therefore, of opinion that, where property has been obtained under circumstances which amount to misdemeanour, it is still sufficient under section 33 (1) of the Larceny Act, 1916, to charge and to prove that the receiver knew that the property fell into the general category of property which has been obtained under circumstances which do in law amount to misdemeanour and that it is unnecessary to prove that he knew that the property was obtained under circumstances which amount in law to the specific misdemeanour by which they were in fact obtained. On the other hand, it is not sufficient merely to prove that the receiver knew that the property fell into the wider category of property which has been dishonestly obtained, for that is equally consistent with

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an erroneous belief that the property was obtained in circumstances which amount to felony and consequently falls short of establishing that degree of knowledge of the general category into which the property fell, which we feel compelled to hold is an essential ingredient of the offence charged.

Similarly, where property has been stolen or obtained under circumstances which amount to felony it is sufficient, and it is also essential, to charge and to prove that the receiver knew that the property fell into the general category of property which has been obtained under circumstances which do in law amount to felony, but it is unnecessary to prove that he knew that the property was obtained under circumstances which amount in law to the specific felony by which it was in fact obtained. But although this is sufficient to establish an offence of felonious receiving under section 33 (1) of the Larceny Act, 1916, more specific knowledge is required where property has in fact been stolen and it is desired, for the purpose of proving guilt, to adduce evidence of guilty knowledge of the receiver of the kind referred to in section 43 (1) of the Act. This evidence (that is, of other stolen property having previously been found in his possession and of previous convictions for dishonesty) is admissible only in the cases where property has been stolen and the receiver knows that it has been stolen. To make such evidence admissible the receiver must be charged with knowing the property to have been stolen and not obtained in any other way even under circumstances which amount to felony.

It follows that in the present case the justices were right in holding as a matter of law that it was not sufficient to show that the accused knew that the goods were obtained by some dishonest means. The prosecution must go further and adduce evidence to show that he knew that they were obtained in circumstances which do in law amount to misdemeanour as opposed to felony. The justices were wrong, however, in supposing that it was necessary for the prosecution to adduce evidence to show that the accused knew the precise nature of the misdemeanour by which the property was in fact obtained.

This brings us to the second question, whether in the present case there was any evidence to show that the accused in fact possessed the requisite degree of knowledge, and in this connection to the Crown's contention that the doctrine of recent possession entitled the justices to infer, in the absence of any explanation by the accused, that he had knowledge of the true facts in which the property was obtained by Mrs. Honey. It may, we think, be misleading to speak of the " doctrine " of recent possession in cases of receiving. It is a convenient way of referring compendiously to the inferences of fact which, in the absence of any satisfactory explanation by the accused, may be drawn as a matter of common sense from other facts, including, in particular, the fact that the accused has in his possession property which it is proved had been unlawfully obtained shortly before he was found to be in possession of it. The so-called " doctrine of recent possession " is not limited to cases of receiving nor to inferences with regard to the accused's knowledge or state of mind. The right inference from recent possession may be that the accused himself has stolen the property, as where he is found in the street near the scene of the housebreaking in possession of the property which has been taken from the house which has been entered. On the other hand, where property has been stolen and there is nothing in the circumstances to point to the accused's having himself committed the crime of stealing, the proper inference from its being found in his possession may be that he received the property knowing not merely that it had been unlawfully obtained, but knowing that it had been stolen. Such an inference is justified by the fact that by far the commonest way in which property is unlawfully obtained is by stealing. But conversely, where property has been obtained under circumstances which amount to misdemeanour, the inference cannot be drawn from its being found in his possession that he knew that it had been obtained in this much less common way as opposed to having been stolen. There may, however, in such a case be facts proved additional to the fact of recent possession which entitle the court to

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draw the inference that the accused knew the true facts with regard to the circumstances in which the property was unlawfully obtained, as where there is evidence of some association between the receiver and the person who obtained the goods, from which it might be inferred that the receiver was in the confidence of the other person and knew what he had in fact done. But the inference appropriate to the particular facts proved is not a presumption of law; it is merely an inference of fact drawn by applying common sense to the proved facts, and there is no "doctrine" that in a receiving case, where recent possession on the part of the accused is proved, he is presumed, in the absence of evidence to the contrary, to have known the true facts of the way in which the goods were obtained.

In the present case there was no evidence of any association between the accused and Mrs. Honey before he bought the refrigerator or between that date and the date when he bought the television set. There was ample evidence that he knew that the goods had been obtained by dishonest means and, had the goods in fact been stolen and not obtained under the circumstances amounting to a misdemeanour, there would, for the reasons we have already indicated, have been a case to answer on the charge of receiving them knowing them to have been stolen. But the facts proved against the accused are precisely those facts from which in so many cases a receiver's knowledge that goods had been stolen is rightly inferred, and we see nothing in the evidence from which the justices could infer that the accused knew that the property had been obtained in circumstances amounting to a misdemeanour as opposed to having been stolen. There was thus no evidence of what we have regretfully held to be an essential ingredient of the offences with which the accused was charged, namely, knowledge by him that the property which he received fell within the category of property which had been obtained in circumstances which amount to misdemeanour. This appeal must therefore be dismissed.

We should have been glad to have been able to come to a

different conclusion, for this case illustrates the difficulty with which the prosecution is faced upon a charge of receiving where the goods have in fact been obtained by a misdemeanour such as false pretences. It seems the height of absurdity that the receiver should have committed no offence if he erroneously thought that the goods had been obtained by the graver crime of stealing; but, although it is the first time that the matter has come before the court, this appears to have been the law since the offence was first created in 1861, and if the matter is to be remedied, as we for our part think it should, only Parliament can do so.

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Appeal dismissed.

Solicitor: J. H. Fellowes, for the respondent.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE DIPLOCK

Re HASTINGS (No. 2)

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Habeas Corpus — Alleged Detention without Legal Sentence — Application Refused by Divisional Court — Application to Another Divisional Court Based on Same Grounds and Evidence—No Right to be Heard.

An applicant, whose application for a writ of habeas corpus has been already heard and refused by a Divisional Court of the Queen's Bench Division, is not entitled to be heard on another application based on the same grounds and evidence by another and differently constituted Divisional Court of the same Division.

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Dictum of Parke B. in *Re* COBBETT (1845) 5 L.T. (o.s.) 130 applied.

Dicta in COX *v.* HAKES (1890) 15 App.Cas. 506, at p. 514, and ELEKO *v.* OFFICER ADMINISTERING THE GOVERNMENT OF NIGERIA [1928] A.C. 459 at p. 468 considered.

Quaere, whether an applicant for a writ of habeas corpus in a criminal matter is entitled to go from judge to judge of the Queen's Bench Division in term time.

Application for habeas corpus.

The applicant, Edward Thomas Hastings, was convicted at Liverpool Crown Court in July, 1957, on an indictment containing five counts. The first count was for larceny as a bailee, the next three for obtaining money by false pretences, and the last for fraudulent conversion. He was sentenced by the Recorder to four years' corrective training, which was not expressly stated to be on each count to run concurrently. On appeal to the Court of Criminal Appeal the conviction on the first count was quashed, but the sentence was not altered. The applicant, who was detained in Liverpool Prison in respect of the sentences, obtained leave to apply to the Divisional Court for a writ of habeas corpus, the grounds of the application being that he was being illegally detained in prison as the sentence was a general sentence on the five counts and, the conviction on one count having been quashed, there was no legal sentence applicable to the other four counts. The application was heard on March 7, 1958, by a Divisional Court consisting of the Lord Chief Justice (Lord Goddard), Streatfeild and Slade JJ. (see (1958) 42 Cr.App.R. 132). The court refused the writ, holding that, as a matter of construction, the words used by the Recorder in passing sentence amounted to the passing of concurrent sentences of four years' corrective training on each count, so that the quashing of the conviction on one count had no effect on the sentence, which remained valid. The applicant appealed to the Court of Appeal, who refused to entertain the appeal on the ground that it arose in a criminal cause or matter. He then obtained leave to apply for habeas corpus to another Divisional Court differently

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constituted. The application was based on the same grounds and evidence as the earlier application.

Neil M. Butter for the applicant.

The Solicitor-General (*the Rt. Hon. Sir Harry Hylton-Foster*, Q.C.) and *Rodger Winn* for the respondent.

Cur. adv. vult.

November 21, 1958. The following judgment was read by:

THE LORD CHIEF JUSTICE: The judgment which I am about to read is the judgment of the court in the preparation of which we have all collaborated.

In these proceedings Mr. Butter moves for a writ of habeas corpus to bring up the body of one Edward Thomas Hastings, at present detained in Liverpool Gaol undergoing a sentence of four years' corrective training, with a view to his being discharged. The ground of the application is that no valid sentence has ever been passed on him. What happened was this. The applicant was convicted at the Liverpool Crown Court on five counts. The first count was a count of larceny as a bailee, a felony; the other counts were for misdemeanours, obtaining money by false pretences and fraudulent conversion. The learned Recorder, in passing sentence, said this: "Edward Thomas Hastings, you have been convicted on the plainest evidence of deliberate, calculated and systematic frauds. Those frauds have not only affected companies well able to sustain loss, but have cruelly brought grave financial burdens on little men, which it will be difficult for them to bear. This is by no means the first time you have been convicted of dishonesty. You are a menace to the integrity and health of the commercial community. You will go to prison for four years' corrective training." The Recorder did not say "concurrent on each count" and the sentence indorsed on the indictment was merely "four years' corrective training," again without any express statement that it was on each count to run concurrently. The applicant was granted

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leave to appeal to the Court of Criminal Appeal against conviction on three counts including the count for felony, and in the result that count was quashed.

In these circumstances the argument sought to be adduced to the court in support of the application is that the sentence was a general sentence on the five counts and that, one count having been quashed, there is no legal sentence applicable to the four remaining counts and that accordingly there is no valid authority for the applicant's detention.

This, however, is not the first application for the writ. An application was heard on March 7, 1958, by a Divisional Court (consisting of Lord Goddard, the Lord Chief Justice, and Streatfeild and Slade JJ.). The court refused the writ, holding that as a matter of construction the words used by the learned Recorder amounted to concurrent sentences of four years' corrective training on each count and that, accordingly, the quashing of one count had no effect on the sentence, which remained a valid sentence. The applicant then appealed to the Court of Appeal, who refused to entertain the appeal on the ground that it arose in a criminal cause or matter in which they had no jurisdiction. The applicant then renewed his application to a Divisional Court consisting of three different judges, it being contended that he had the right to go from judge to judge and from one Divisional Court of three judges to another Divisional Court of three different judges. The court, being of opinion that there was an arguable point, gave leave to move, but subject to the court being satisfied that they had jurisdiction to hear and were bound to hear a fresh application. We should add that the present application is on exactly the same grounds and on the same evidence as in the previous application.

The Solicitor-General has contended first that, contrary to what has been generally presumed, an applicant has never had a right to go, as it is said, from judge to judge except when the court is not sitting; secondly, and in the alternative, that though prior to the Supreme Court of Judicature Act, 1873, an applicant could go from court to court, for example,

from the Court of Queen's Bench to the Court of Common Pleas, yet, at any rate since 1880 when by Order in Council the Queen's Bench, Common Pleas and Exchequer Divisions of the High Court were fused, an applicant who has been to a Queen's Bench Divisional Court has exhausted his rights in regard to all the judges of the Queen's Bench Division.

It is undoubtedly assumed today to be the law that an applicant for a writ of habeas corpus in a criminal matter—and we are only dealing with criminal matters—can apply to every judge in turn. In COX *v.* HAKES (1890) 15 App.Cas. 506, one of the leading authorities on habeas corpus, Lord Halsbury L.C., at p. 514, said: "For a period extending as far back as our legal history, the writ of habeas corpus has been regarded as one of the most important safeguards of the liberty of the subject. If upon the return to that writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody. If release was refused, a person might—see *Ex p.* PARTINGTON (1845) 13 M. & W. 679—make a fresh application to every judge or every court in turn, and each court or judge was bound to consider the question independently and not to be influenced by the previous decisions refusing discharge." Again, in the more recent case before the Judicial Committee of the Privy Council, ELEKO *v.* OFFICER ADMINISTERING THE GOVERNMENT OF NIGERIA [1928] A.C. 459, Lord Hailsham L.C. said at p. 468: "If it be conceded that any judge has jurisdiction to order the writ to issue, then in the view of their Lordships each judge is a tribunal to which application can be made within the meaning of the rule, and every judge must hear the application on the merits. It follows that, although by the Judicature Act the courts have been combined in the one High Court of Justice, each judge of that court still has jurisdiction to entertain an application for a writ of habeas corpus in term time or in vacation, and that he is bound to hear and determine such an application on its merits notwithstanding that some other judge has already refused a similar application." Further, in *Ex p.* CHAPPLE (1950) 66

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T.L.R. (Pt. 2) 932, Denning L.J. (as he then was) said at p. 936: "In the year 1679, when the writ of habeas corpus was given its modern efficiency, Parliament conferred the power of issuing it, not only on the judges of the King's Bench, who had theretofore issued it, but also on the Lord Chancellor, the Lord Keeper, the Judges of the Common Pleas, and the Barons of Exchequer. Indeed, section 10 of the Habeas Corpus Act, 1679, provides: 'That it shall and may be lawful to and for any prisoner and prisoners as aforesaid, to move and obtain his or their habeas corpus as well out of the High Court of Chancery or Court of Exchequer, as out of the Courts of King's Bench or Common Pleas or either of them'; so that in those days a subject could apply to any of the superior courts of the Realm to issue a writ of habeas corpus. Not only was the subject entitled to apply for the writ, but the judges themselves were obliged to issue it in proper cases and were subject to severe penalties if they did not do so. If any court or judge refused to issue it, the applicant had no right to appeal to a higher court, but he could go from court to court and from judge to judge without being met by a plea of *res judicata*."

The Solicitor-General, however, points out that the views of Lord Halsbury and of Denning L.J. were expressed *obiter* and that the case of ELEKO (*supra*), though persuasive authority, is not binding on this court. He accordingly asks us to look at the matter afresh.

We think that it is clear that, at any rate since the end of the eighteenth century, an applicant has always had the right to apply successively to every tribunal competent to issue a writ of habeas corpus. The problem thus involves ascertaining first what tribunals had that power before the passing of the Supreme Court of Judicature Act, 1873, and secondly, upon what tribunals that power has devolved as a result of that Act and its successors, in particular the Supreme Court of Judicature (Consolidation) Act, 1925. In considering the early history of the matter it is relevant to bear in mind that the common law courts of King's Bench, Common Pleas and

Exchequer functioned as courts only in term time and that each of the four legal terms was of brief duration. Consequently the greater part of the year fell during the legal vacations, although the judges of the courts might be sitting under Commissions of Assize, oyer and terminer and general gaol delivery or hearing cases in Middlesex at *nisi prius*. Furthermore, each of the common law courts sat *in banc* and no individual judge of the court had any general power to act for the court. Even a decision at *nisi prius* only became a judgment of the court upon motion to the court upon the fourth day of the term next following the verdict at *nisi prius*.

The position prior to the passing of the Habeas Corpus Act, 1679 (31 Car. 2, c. 2), is far from clear. It is noteworthy, however, that in section 6 of the Habeas Corpus Act, 1640 (16 Car. 1, c. 10), it was provided as follows: "That if any person shall hereafter be committed, restrained of his liberty, or suffer imprisonment, by the order or decree of any such Court of Star Chamber, or other court aforesaid, now or at any time hereafter having, or pretending to have, the same or like jurisdiction, power, or authority to commit or imprison as aforesaid, or by the command or warrant of the King's Majesty, his heirs or successors, in their own person, or by the command or warrant of the Council Board, or of any of the Lords or others of His Majesty's Privy Council; that in every such case every person so committed, restrained of his liberty, or suffering imprisonment, upon demand or motion made by his counsel, or other employed by him for that purpose, unto the judges of the Court of King's Bench or Common Pleas, in open court, shall, without delay, upon any pretence whatsoever, for the ordinary fees usually paid for the same, have forthwith granted unto him a writ of habeas corpus, to be directed generally unto all and every sheriffs, gaoler, minister, officer, or other persons in whose custody the party committed or restrained shall be, and the sheriffs, gaoler, minister, officer, or other person in whose custody the party so committed or restrained shall be, shall, at the return of the said writ, and according to the command thereof, upon

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due and convenient notice thereof given unto him, at the charge of the party who requireth or procureth such writ, and upon security by his own bond given, to pay the charge of carrying back the prisoner, if he shall be remanded by the court to which he shall be brought, as in like cases hath been used, such charges of bringing up and carrying back the prisoner to be always ordered by the court, if any difference shall arise thereabout, bring or cause to be brought, the body of the said party so committed or restrained unto and before the judges or justices of the said court from whence the said writ shall issue, in open court, and shall then likewise certify the true cause of such his detainer or imprisonment, and thereupon the court, within three court days after such return made and delivered in open court, shall proceed to examine and determine whether the cause of such commitment appearing upon the said return be just and legal, or not, and shall thereupon do what to justice shall appertain, either by delivering, bailing, or remanding the prisoner: and if anything shall be otherwise wilfully done, or omitted to be done, by any judge, justice, officer, or other person aforementioned, contrary to the direction and true meaning hereof, that then such person so offending shall forfeit to the party grieved his treble damages, to be recovered by such means, and in such manner as is formerly in this Act limited and appointed for the like penalty to be sued for and recovered." The reference is always to the judges sitting as a court and an open court and not to them as individual judges. This was an Act to extend the right to the writ of habeas corpus, not to diminish the rights to it previously enjoyed by the subject. If before the passing of this Act the subject had had any recognised right to apply to each individual judge in turn or to an individual judge without having to apply to the judges sitting as a court, it is difficult to suppose that the Act would have been framed in the terms in which we find it enacted.

The Court of King's Bench unquestionably had the power to issue the writ of *habeas corpus ad subjiciendum* in criminal and supposed criminal matters in term time. It appears from

the judgment of Blackstone J. in WOOD'S CASE (1771) 2 Black. W. 745 that the Court of Common Pleas had by 1679 successfully asserted a similar general power, originally by making use of the legal fiction that the applicant was a party to a current suit in the Common Pleas, a fiction that was dropped after the passing of the Habeas Corpus Act, 1640. The Court of Exchequer had not, by 1679, acquired any general power to issue the writ, but made use of it in the case of persons genuinely privileged to be sued only in the Court of Exchequer. There appears to be no trace, however, of any of these courts exercising the power to issue the writ except in term time and upon motion to the court sitting *in banc*.

According to the views of Coke and of Hale the writ could issue out of Chancery in term time or in vacation, although Lord Nottingham L.C., in JENKES'S CASE (1676) 6 St.Tr. 1190, took the contrary view, a decision which has been described as being the cause of the passing of the Act of 1679.

The Act of 1679 was a procedural Act. It applied only to persons detained for criminal or supposed criminal matters and was directed specifically to the abuse of detaining persons in prison without bail and without bringing them to trial. So far as is relevant to the present inquiry it did two things which had much wider consequences: (1) by section 9 it provided that in criminal or supposed criminal matters the High Court of Chancery and the Court of Exchequer as well as the Courts of King's Bench and Common Pleas should have power to issue the writ of *habeas corpus ad subjiciendum*; and (2) by section 2 it provided that in criminal or supposed criminal matters any judge of those courts could, in vacation, act for the court of which he was a member, and if upon return of the writ he found the case was bailable, release the prisoner on his recognisances to take his trial in the Court of King's Bench the term following, or at the next assize, sessions or general gaol delivery to be held in the place where the offence of which the prisoner was charged was cognisable. The powers conferred by this Act upon single judges were thus limited in three respects: first, as to the type of case in which they could be

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exercised, namely, criminal and supposed criminal matters; secondly, as to the powers of the judge, namely, to bail the prisoner; and thirdly, as to the time in which they could be exercised, namely, in vacation.

It seems that by the middle of the eighteenth century the first two limitations upon the powers of a single judge had ceased to operate in practice. By 1758 the Court of King's Bench treated the writ of habeas corpus as issuable, in all cases not merely criminal and supposed criminal cases, by a single judge in vacation, and the power of the judge upon the return as extending to discharging and not merely to bailing the prisoner. (See SHEBBEARE (1758) 1 Burrows 460; MEAD (1758) *ibid.* 541; CLARKE (1758) *ibid.* 606.) This was no doubt a natural extension of the statutory power, since, if the judge on the return of the writ in a supposedly criminal case was to find that it was not a criminal case and that the detention was unlawful, it would not be consonant with the libertarian views of common lawyers in the eighteenth century that the prisoner should not be ordered to be discharged.

The Habeas Corpus Act, 1816, gave statutory recognition to these extensions of the powers of a single judge in vacation which had already been adopted by the Court of King's Bench and extended them to judges of the Common Pleas and the Exchequer. It also gave these judges and their respective courts in term time the power to inquire into the truth of the return. It did not apply to the Court of Chancery, which was slower to assert the general power to issue writs of habeas corpus except as authorised by the Act of 1679, but in CROWLEY'S CASE (1818) 2 Swans. 1, Lord Eldon L.C., after an elaborate examination of the history of the matter, held that the Lord Chancellor had the general power to issue writs of habeas corpus in term or in vacation. But while the limits on the powers of a single judge of the common law courts granted by the Act of 1679 were in these two respects swept away by the practice of the King's Bench Court in the eighteenth century and finally by the Act of 1816, there is no suggestion that we can find in the cases or the writings of

lawyers that the third limitation, namely, that a single judge could issue the writ in vacation only was ever impinged upon. Thus in Chitty's *Criminal Law*, 2nd ed. (1826), Vol. 1, p. 124, it is stated that it " must be obtained by motion to the court in term time, and by application to a judge in vacation." The practice is also so stated in the judgment of Abbott C.J. in HOBHOUSE'S CASE (1820) 3 B. & A. 420. We think it is established that in term time the writ was issuable only by the court sitting *in banc*. Except in vacation a single judge had no power to do so.

There is no doubt that in term time an applicant could go from court to court, that is, from King's Bench to Common Pleas, from Common Pleas to Exchequer, from Exchequer to Chancery, and it may well be that in vacation he could go from judge to judge even of the same court. But it appears clear that he could not apply twice to the same court on the same facts, for, while the decision whether or not to issue a writ of habeas corpus is not a judgment so that there is no *res judicata*, it is not a writ of course (HOBHOUSE'S case, *supra*) and the decision whether or not to issue it involves the exercise of a judicial discretion. The court must have an inherent jurisdiction to refuse, having once exercised its discretion, to hear the same matter argued again. Thus in *Re* COBBETT (1845) 5 L.T.(o.s.) 130 an application had been refused by the Court of Queen's Bench and again by the Court of Exchequer. It was then made a second time to the Court of Exchequer when Parke B., in the course of the argument, said: " You have been heard once: we cannot enter into this matter again." The common law courts, as we have already mentioned, prior to the Supreme Court of Judicature Act, 1873, sat *in banc*, all members of the court available in London sitting together, although there might on occasions be absentees. But the decision was the decision of the court, and there is no suggestion to be found in any of the cases that the absence of one or more members would enable an applicant to apply again to the same court when it was differently constituted.

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What, then, is the historical foundation for the dictum of Lord Halsbury in COX *v.* HAKES (*supra*)? He refers to *Ex p.* PARTINGTON (1845) 13 M. & W. 679, which is also reported in 9 Jur. 92. In that case an application for the writ had been refused by the Court of Queen's Bench. The application was renewed before and refused by the Lord Chief Baron and was then renewed before the Court of Exchequer. Parke B., in giving the judgment of the court refusing the application, said this (9 Jur. at p. 94): "The defendant, however, had a right to take the opinion of the court as to the propriety of the imprisonment; and, therefore, we have thought it proper to examine attentively the provisions of the statute [under which the applicant was in custody] without considering ourselves as concluded by these decisions. But we are all of opinion that the defendant is not entitled to his discharge; and we entirely agree in the judgment of the Court of Queen's Bench, which was approved of by the Lord Chief Baron, and are satisfied of the correctness of the reasons stated to us to have been assigned by Lord Denman for that judgment." Parke B., therefore, was only expressly affirming the right to go from one court to another. That the application to the Lord Chief Baron was made in vacation is not expressly stated, but it was anyhow made in chambers, and, in view of what we have already indicated as to the practice, we think it reasonably certain that it was made in vacation. In the report of the case in 9 Jur. at p. 93, however, there appears an interjection of Pollock C.B., to whom the previous application had been made, in these words: "Yes, and of every judge," meaning that a person is entitled to take the opinion of every judge. This interjection is quite consistent with its being a reference to what might take place in vacation, and we think that it must have been so intended.

Re COBBETT (*supra*) was decided in the same year. In the course of that case, in addition to the observations to which we have already referred, Parke B. said: "You can go to another court in which you have not been heard. I believe this matter has been heard in the Queen's Bench as well as

here [the Court of Exchequer], but as it is an application for a habeas corpus, you are entitled to the judgment of each court and of each judge; and therefore you may go to the Court of Common Pleas. If this was the only court in which you could be heard we might then, perhaps under the circumstances, re-hear the case." There is here the only other pre-Judicature Act reference that we can find to an applicant's being entitled to the judgment of each judge, but here again Parke B. may be referring only to the time when the court is not sitting.

In COX *v.* HAKES, in the Court of Appeal, under the title *Ex p.* Cox (1887) 20 Q.B.D. 1, Lord Esher M.R., at p. 13, said: "It was argued that, if such an appeal lies [to the Court of Appeal], a prisoner would be deprived of the privilege which he had under the old practice of applying, where his application for a habeas corpus was refused by one judge, to all the other judges in succession. It is not correct to say that under the old system there could be an application to all the judges in succession. There could be an application to all the courts in succession." It is true that the decision of the Court of Appeal was reversed by the House of Lords ((1890) 15 App.Cas. 506), but none of their Lordships dissented from Lord Esher's statement, unless it be Lord Halsbury in the observations to which we have already referred. It is to be observed that neither Lord Bramwell nor Lord Herschell subscribed to Lord Halsbury's observations. Lord Bramwell, at p. 523, says: "However, as has been said, we have got on without such appeals hitherto, and might continue to do so and thrive. I say 'without such appeals,' for, with all respect, I cannot agree that going first to a judge of one court, and then, on being refused by the judge, going to a court, and, on being refused by one court, going to another, was or is an appeal. The court applied to after refusal by a judge or other court was not exercising an appellate jurisdiction in entertaining the application. It was exercising a primary jurisdiction. It need not have heard of the former application, nor known of the materials on which it was founded; and, indeed,

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those before it might be different from the former. If, indeed, such a proceeding was an appeal that appeal exists still. Clearly, where the first application is to a single judge, and where to the High Court, the Lord Chancellor could grant the writ refused by them on application to him, and vice versa. Whether if one division of the High Court, before the Queen's Bench, Common Pleas, and Exchequer Divisions were fused, had refused the writ, then another division would have been bound to entertain an application for one, I know not. If yes, then the Judicature Act left the matter as it was before. Anyhow, there is the possibility of a second application now as of right, so that there is the less need for an express appeal to supply the want of being able to try more than one tribunal." Lord Herschell, at p. 527, says: "It will be convenient, before proceeding to an examination of the section of the Judicature Act upon which this case turns, to state briefly the mode in which the courts have administered the law in relation to that writ. It was always open to an applicant for it, if defeated in one court, at once to renew his application to another. No court was bound by the view taken by any other, or felt itself obliged to follow the law laid down by it. Each court exercised its independent judgment upon the case, and determined for itself whether the return to the writ established that the detention of the applicant was in accordance with the law. A person detained in custody might thus proceed from court to court until he obtained his liberty. And if he could succeed in convincing any one of the tribunals competent to issue the writ that he was entitled to be discharged, his right to his liberty could not afterwards be called in question." Lord Watson agreed with Lord Bramwell and Lord Herschell, and Lord Macnaghten agreed with Lord Herschell. Lord Field, who dissented, at p. 543 says: "In support of this argument it was correctly stated, as some of the noble and learned Lords who have addressed your Lordships have already pointed out, that at the time of the passing of the Act it was the undoubted right of a subject detained in custody to question by habeas the lawfulness of his detention

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before every one of Her Majesty's courts in succession, without regard to the refusal to discharge by any one or more of them; and that if any one court came to the conclusion that the applicant was entitled to be discharged, no other court had any power of modification or reversal."

It is all the more noteworthy that their Lordships confined themselves in this way to the right of going from court to court having regard to their experience prior to the Supreme Court of Judicature Act, 1873. Lord Bramwell had been a Baron of the Court of Exchequer from 1856, Lord Esher had been a justice of the Court of Common Pleas since 1868, and Lord Field had been a justice of the Court of Queen's Bench.

Again, in SECRETARY OF STATE FOR HOME AFFAIRS *v.* O'BRIEN [1923] A.C. 603 Lord Birkenhead, at p. 609, says: "In the course of time certain rules and principles have been evolved, and many of these have been declared so frequently and by such high authority as to become elementary. Perhaps the most important for our present purpose is that which lays it down that if the writ is once directed to issue and discharge is ordered by a competent court, no appeal lies to any superior court. Correlative with this rule, and markedly indicative in itself of the spirit of our law, is that other which establishes that he who applies unsuccessfully for the issue of the writ may appeal from court to court until he reaches the highest tribunal in the land."

So far we venture to think that the authorities cannot be said to support the principle that except in vacation an applicant could go from judge to judge as opposed to going from court to court. Nor can we trace any single instance in the books of application being made to successive judges of the same court. The only real authority to the contrary appears to be ELEKO *v.* OFFICER ADMINISTERING THE GOVERNMENT OF NIGERIA [1928] A.C. 459, to which we have already referred. Two considerations seemed to have influenced the Judicial Committee in that case: (1) that it would be curious if an applicant could by reason of the Act of 1679 renew his application before each judge in vacation, whereas in term he could

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make it once to the Court of Chancery and once to each of the three courts of common law. We have dealt with the historical evidence in its favour, but is this so curious? An applicant is entitled to the opinion of the full court. In vacation he cannot obtain that and so he was given the right to go from judge to judge. (2) That since by reason of the Supreme Court of Judicature Act, 1873, there is only one court, the Supreme Court of Judicature, an applicant by reason of that Act would only be able to make one application, namely, to the Supreme Court, unless he also had the right to go from judge to judge.

This second reason brings us to an examination of the Judicature Acts, but before doing so we would mention that in THE STATE (DOWLING) *v.* KINGSTON (No. 2) [1937] Ir.R. 699 there is to be found a most illuminating judgment of FitzGibbon J. (with whom Sullivan C.J. agreed) which considers ELEKO (*supra*) in great detail and gives, we think, cogent reasons for thinking that Lord Hailsham L.C. may have gone too far in that case.

The Supreme Court of Judicature Act, 1873, by section 3, united into one Supreme Court of Judicature the High Court of Chancery of England, the Court of Queen's Bench, the Court of Common Pleas at Westminster, the Court of Exchequer and other courts not relevant to the present matter. By section 16 the jurisdiction of all these courts and the jurisdiction which at the commencement of the Act was vested in or capable of being exercised by all or any one or more of the judges of those courts sitting in court or chambers or elsewhere was transferred to the High Court of Justice. There was thus transferred to the High Court of Justice any jurisdiction to issue writs of habeas corpus previously vested in the common law courts and in the individual judges of those courts. Section 23 provided that, subject to the Act and rules made thereunder, the transferred jurisdiction should be exercised as nearly as may be in the same manner as it might have been exercised by the respective courts from which the jurisdiction had been transferred. Section 26 abolished the division of the

legal year into terms, and gave the High Court power to sit at any time. Provisions for vacations and sittings in vacation were made by sections 27 and 28, but the new vacations, unlike the old, were not periods during which the common law courts were not in general able to function. Section 31 set up five divisions of the High Court, namely, Chancery, Queen's Bench, Common Pleas, Exchequer and Probate, Divorce and Admiralty; but section 32 authorised the Queen in Council to order the reduction or increase in the number of divisions. It was under this power that the three common law divisions were combined into a single Queen's Bench Division by Order in Council in 1880.

Section 39 conferred upon single judges of the High Court such jurisdiction as was previously exercisable by single judges of the former common law courts and such other jurisdiction of the High Court as might be directed or authorised to be so heard by Rules of Court, while section 40 provided that such causes and matters as were not proper to be heard by a single judge should be heard by Divisional Courts. Further, by section 41 it was provided as follows: "Subject to any rules of court, and in the meantime until such rules shall be made, all business belonging to the Queen's Bench, Common Pleas, and Exchequer Divisions respectively of the said High Court, which, according to the practice now existing in the superior courts of common law, would have been proper to be transacted or disposed of by the court sitting *in banc*, if this Act had not passed, may be transacted and disposed of by Divisional Courts, which shall, as far as may be found practicable and convenient, include one or more judge or judges attached to the particular division of the said court to which the cause or matter out of which such business arises has been assigned; . . ."

At this stage, therefore, the position was that, subject to any rules of court, a single judge of the Queen's Bench Division sitting in court or chambers could exercise in relation to writs of habeas corpus any jurisdiction which could formerly have been exercised by a single judge of any of the three

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common law courts, while a Divisional Court of each of the three Common Law Divisions could exercise the jurisdiction of the former Common Law Courts sitting *in banc*. The effect of the Order in Council in 1880 was that the Queen's Bench Division became the successor of the three Courts of Queen's Bench, Common Pleas and Exchequer sitting *in banc*, the only differences being that any two or more judges sitting as a Queen's Bench Divisional Court should constitute and be the court sitting *in banc*. That being so, we think that after 1880 an applicant for habeas corpus who had been heard by a Queen's Bench Divisional Court and refused, if he applied again to a Queen's Bench Divisional Court upon the same evidence was in the same position as an applicant before 1873 who made a second application to the same common law court, and could be met with the objection with which the applicant was met in *Re* COBBETT (*supra*): "You have been heard once: we cannot entertain this matter again."

The Supreme Court of Judicature (Consolidation) Act, 1925, did not re-enact the express provisions of section 41 of the Act of 1873 with regard to the powers of the former common law courts sitting *in banc* being exercisable only by Divisional Courts. Section 63, however, provided that Divisional Courts might be held for the transaction of any business in the High Court ordered by Rules of Court to be heard by a Divisional Court and that Divisional Courts for the purpose of the matters to be heard by them should exercise all or any part of the jurisdiction of the High Court which included all the jurisdiction formerly exercised by the three common law courts. Finally, by R.S.C., Ord. 59, rr. 1 and 14, the jurisdiction of the High Court in relation to habeas corpus was directed to be exercised either by a single judge or by a Divisional Court. We do not think that this altered the position of a Queen's Bench Divisional Court when sitting to hear applications for habeas corpus. It still is the successor of the three common law courts sitting *in banc*; its decision is equivalent to the decision of all the judges of the Division just as the decision of one of the old common law courts sitting

in banc was the equivalent of the decision of all the judges of that court.

We know of no case since 1880 in which an application based on the same grounds and the same evidence has been renewed before a Divisional Court consisting of different judges of the Queen's Bench Division. Nor are there to be found any dicta in support of the making of such an application unless it be in *Ex p.* CHAPPLE (*supra*), in which Denning L.J. (as he then was) said (66 T.L.R. (Pt. 2) at p. 936): "The only remedy of the subject is to go before another Divisional Court or another judge . . ." It may be that he was referring to a Divisional Court of another Division, but, if he meant a Divisional Court of the Queen's Bench Division consisting of different judges, we think that he was wrong.

We hold, therefore, that the applicant, having already once been heard by a Divisional Court of the Queen's Bench Division, is not entitled to be heard again by another Divisional Court of the same Division.

That is sufficient to dispose of the present case. Although it has been necessary for the purpose of ascertaining the nature of the jurisdiction exercised today by the Divisional Court in matters of habeas corpus to canvass the historical justification for the view expressed by the Judicial Committee in ELEKO's case (*supra*), it is not necessary for the decision of the present application for us to express any concluded opinion on the extent of an applicant's right today to go from judge to judge as distinct from going from Divisional Court to Divisional Court of the Queen's Bench Division. ELEKO's case (*supra*) has remained unquestioned—except in the Irish case to which we have referred—for thirty years, and there are parallel decisions in Canadian and Australian courts. In a matter so important to the liberty of the subject we would not lightly disregard the principles there laid down and their correctness can be left for consideration until a case arises in which they are directly in point.

We would only repeat, in conclusion, what Lord Goddard has so often said, that there should be an appeal to the House

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of Lords in criminal matters where the writ of habeas corpus has been refused. This case is just the case in which a ruling by the highest tribunal in the land is required.

Application refused.

Solicitors: The Official Solicitor, for the applicant; the Treasury Solicitor, for the respondent.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY, MR. JUSTICE CASSELS, MR. JUSTICE BARRY AND MR. JUSTICE PAULL

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Sentence — Two Offences each Charged in a Separate Count — Detention in Detention Centre in Respect of First—Probation Order in Respect of Second — Course Not Permissible to be Adopted—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *ss.* 3 (1), 18 (2), 80.

The appellant pleaded guilty at quarter sessions to two counts in an indictment, the first of which charged storebreaking and larceny and the second storebreaking with intent to steal. He was sentenced to detention in a detention centre on the first count and placed on probation on the second count. Subsequently he was convicted at a magistrates' court of larceny and, in view of the breach of the probation order, was brought back to quarter sessions to receive sentence for the offence of storebreaking with intent. Quarter sessions imposed a sentence of Borstal training.

Held, that though the course adopted was not forbidden by the express language of the Criminal Justice Act, 1948, where there were two separate offences, the making of a probation order which could not immediately be of effect in such circumstances was contrary to the spirit and intention of the Act and was improper. The probation order must, therefore,

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be quashed, and as the sentence of Borstal training arose out of a breach of the probation order, it also must be quashed.

A sentence of imprisonment, Borstal training or detention imposed during the currency of a probation order does not revoke such order. The probation order merely falls into abeyance and, if the prisoner is released before the expiry of the probation period, the order will revive and be fully effective.

Appeal against sentence.

The appellant, who was aged 18, pleaded guilty in April, 1957, at Surrey Quarter Sessions, to two counts of an indictment which charged him respectively with storebreaking and larceny and storebreaking with intent to steal. He was sentenced to three months' detention in a detention centre on the first count and placed on probation for two years on the second count. On July 19, 1958, he pleaded guilty at Wimbledon Magistrates' Court of larceny of 8s. from a gas meter and to larceny of 12s. from his employers, and was fined £4 on each charge. On July 28, 1958, he was brought back to Surrey Quarter Sessions to receive sentence for the offence for which he had been placed on probation and was sentenced to Borstal training. Against that sentence he applied for leave to appeal. The court granted leave, and extended the time for an appeal against the original probation order.

Peter Bruce for the appellant. It is clear that the court could not pass a sentence of detention followed or accompanied by a probation order if there was only one count in the indictment, since a probation order is made instead of passing sentence: see section 3 (1) of the Criminal Justice Act, 1948. A term in a detention centre is a sentence. This is clear from the definition of "sentence" in section 80 of the Act. [He referred also to PARRY AND OTHERS, 34 Cr.App.R. 224; [1951] 1 K.B. 590.] Further, it is submitted that even where there are two counts the court cannot pass at the same time a sentence to be served in a detention centre and make a probation order, because before imposing such sentences the

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court would have to be satisfied of inconsistent matters. Under section 3 (1) a probation order can only be made where, having regard to the circumstances, it is expedient to do so. The " circumstances " referred to must include how the court is proposing to deal with the offender on other counts in the indictment. Under section 18 (2) it is expressly provided that a court shall not order a person to be detained in a detention centre . . . (*inter alia*) unless the court has considered every other method (except imprisonment) by which the court might deal with him and is of opinion that none of those methods is appropriate. Even where there are separate counts it would be illogical for the court to say under section 18 (2) that probation was inappropriate on one count, but that it was appropriate on another count.

The question further arises whether the sentences are concurrent or consecutive. In this case the sentence of detention and the probation order appear to be concurrent. It is submitted that concurrent sentences of this kind are an absurdity. Section 3 (4) of the Act of 1948 makes certain limited provision for conditions of residence during probation, but they are clearly not relevant in this case, nor could they be made use of—the phrase " any other institution " must be construed *ejusdem generis* and in any event could not include prisons or detention centres, which are the subject-matter of express reference in the Act. Further, it would be absurd if disciplinary offences in the detention centre ought also to be treated as breaches of probation.

It is conceded that on occasions sentences of imprisonment or in a detention centre and probation can and do run together, as, for example, where imprisonment is passed in respect of an offence committed during the period of probation. The probation order will not be discharged unless the court passing sentence has also dealt with the breach of probation, when the order is discharged by virtue of section 5 (4), or the court has discharged the order on an application under paragraph 1 of the First Schedule to the Act. In cases where the probation order has not been discharged, it could

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still be effective after the offender had served a term of imprisonment or detention. These cases, it is submitted, do not affect the position where the court is passing sentences on different counts at the same time. Moreover, it is often a condition of the probation order that the offender should not associate with undesirable persons, which would be inappropriate if the court was ordering the offender to spend three months in a detention centre.

Further, it is submitted that a probation order cannot be made as a consecutive sentence to take effect after a term has been served in a detention centre. There is no power to make a probation order to come into effect at some future date. The whole tenor of the provisions relating to probation, in particular section 3 (6), which uses the word "forthwith," support the argument that the order is to be one which comes into effect immediately.

In effect, the court, in passing a sentence such as the one under appeal, is attempting to provide for compulsory after-care. The only provisions for after-care are those contained in section 22 and the Fourth Schedule to the Act. It would follow, if the present sentences are upheld, that where there is more than one count in an indictment a court could pass a sentence on an adult of, say, six months' imprisonment and make a two years' probation order.

When the appeal was first before the court, it was contended on behalf of the Crown that it would be possible for a court to postpone sentence on the second count in the indictment until after the prisoner has served his sentence in a detention centre. It is submitted such a course would be wrong. On a number of occasions this court has disapproved of the practice of postponing or suspending sentence. Moreover, in the case of quarter sessions other than London and Middlesex there would sometimes be an interval between the offender's release from a detention centre and his being brought up for sentence at quarter sessions, especially as he might earn up to one-sixth remission of sentence for good behaviour.

[THE LORD CHIEF JUSTICE: And in any event the accused

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could refuse to be placed on probation and the court would then have to pass some other sentence.]

H. J. Leonard, for the Crown. As there were two counts in the indictment at Surrey Quarter Sessions, and as each count is, in law, equivalent to a separate indictment, there was nothing in law to prevent quarter sessions from making the two orders at the same time, and the case of PARRY (*supra*) did not apply. The practical consequence of the two orders was that the probation order was ineffective until the term at the detention centre was completed. A similar situation commonly arises where a probation order is made in respect of a man who has a short period of military service to complete. The common practice of making a probation order at the same time as an order committing to a detention centre is expedient, because it provides for supervision which would otherwise not be available. In the absence of a probation order, the offender would be released, without further guidance, after a short period of discipline.

THE LORD CHIEF JUSTICE: This appellant, aged 18, pleaded guilty in April, 1957, at the Surrey Quarter Sessions, to two offences, one of storebreaking and larceny and the other of storebreaking with intent to commit a felony. Both offences were committed with another boy on the same night, and he was sentenced to three months in a detention centre on the first count and placed on probation for two years on the second count. In July, 1958, he pleaded guilty to larceny from a gas meter and also to larceny as a servant, and he was fined by a magistrates' court at Wimbledon. Later, on July 28, he was again brought before the Surrey Quarter Sessions in respect of breach of the probation order, when he was sentenced to Borstal training. The appellant then applied for leave to appeal to this court against that sentence of Borstal training, and the court, being concerned whether the original probation order running concurrently with the sentence of detention was a proper order, extended the time and gave leave to appeal against the original order made in April last.

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The relevant sections of the Criminal Justice Act are sections 3 and 18. So far as they are material they provide as follows: By subsection (1) of section 3: " Where a court by or before which a person is convicted of an offence (not being an offence the sentence for which is fixed by law) is of opinion that having regard to the circumstances, including the nature of the offence and the character of the offender, it is expedient to do so, the court may, instead of sentencing him, make a probation order. . . ." By section 18, which is the section providing for detention in a detention centre, it is provided by subsection (2): " A court shall not order a person to be detained in a detention centre—(*a*) if he has been previously sentenced to imprisonment or Borstal training; (*b*) if he is not less than seventeen years of age, and has previously been ordered to be so detained since attaining that age; and shall not order any other person to be so detained unless the court has considered every other method (except imprisonment) by which the court might deal with him and is of opinion that none of those methods is appropriate."

It is quite clear that, if there had only been one offence, it would have been impossible to couple an order for probation with a sentence of three months' detention in a detention centre. By section 3 (1), which I have read, a probation order can only be made instead of a sentence and by section 80 of the Act it is provided that " sentence " includes an order for detention in a detention centre. But in the present case, as I have already said, there were two counts equivalent to two separate indictments, and if one looks at the express words of the Act, there does not appear to be anything which expressly prevents a probation order being made on the second count instead of a sentence on that second count. It may be rather artificial that, if the court has both offences before it and has to consider the circumstances, they should be obliged to or that they should properly treat these two offences as completely separate and, as it were, go by stages and with regard to the first count apply their minds to section 3 and section 18 and, having dealt with that, proceed to do exactly

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the same thing quite independently in regard to the second count. Be that as it may, it appears to this court that there are no express words which prevent these two orders being made at one and the same time. But although that may well be so, the court is clearly of opinion that the making of a probation order in such circumstances is contrary to the spirit and intention of the Act.

To take the present case, the proper sentence, as it seems to us, should have been three months in a detention centre on each count to run concurrently, and for the court of quarter sessions to substitute probation in regard to the second count is really in the nature of providing for after-care. We are far from saying that some provision for after-care in such a case would not be very highly appropriate. A young man coming out of a detention centre after a period of discipline may well need looking after, and it may well be to his advantage to be under the supervision of a probation officer; but the question is whether section 3 and the provision for probation can properly be made use of to provide for after-care. The matter becomes clearer if one considers the position in reverse. Supposing in this case on the first count the court had made a probation order and then proceeded on the second count, considering the matter quite independently, to make an order for detention for three months in a detention centre. If one looks at it in that way, it becomes quite clear that the only justification for the probation order on the first count would be to provide for after-care. It is also clear that, if such an order as was made in this case is properly made, it could also be made in the case of imprisonment. For two offences being dealt with at one and the same time, if the argument is right, there could be a short sentence of imprisonment and at the same time a probation order for three months, and that clearly could be only for the purposes of after-care, and provision is made in the Act for after-care, in particular in section 22 (1).

Again, there is a further point in that in the ordinary way one would think that a probation order must operate forthwith, whereas in the present case it could not become effective

until the appellant was released from a detention centre. No doubt it does happen at times that a probation order and a sentence of imprisonment or indeed detention in a detention centre might run concurrently. Thus, a sentence of imprisonment imposed during the currency of the probation order would not revoke that order. It would merely fall into abeyance, and if the prisoner was released before the expiry of the probation period the probation order would revive and be fully effective. But that, as it seems to us, is quite a different case from the present when the coming into operation of the order itself is in effect postponed. After all, a court dealing with these two offences at the same time cannot say whether at the end of a three months' period in a detention centre the prisoner will need probation. One of the matters that has to be considered is his character, and it must be his character at the time when the probation order becomes effective. In saying that, the court does not wish to throw any doubt on what is said to be the practice in regard to National Service cases. It may well be then that, if there is only a short time before the accused will have served his full period of National Service, it would be proper to make a probation order which would not become fully effective until he was released from the Services. But in a case such as this, where one is dealing with two offences and where for one offence he is placed wholly and entirely out of the control of the probation officer, it seems to this court that an order for detention in a detention centre and an order for probation are wholly inconsistent.

Accordingly, the result in the present case is that the court must quash the probation order which was made on the second count and substitute for it an order for detention in a detention centre for three months, to run concurrently with the order made on the first count. In the result, the sentence of Borstal training itself which was imposed in respect of a breach of the probation order must also be quashed and the appellant is discharged. It is quite clear that he is a very lucky man in that if he had been committed to quarter sessions for sentence

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for the offences for which he was fined in July, he would undoubtedly have gone to Borstal training, but as the Borstal training was imposed in respect of the breach of the probation order and the probation order has gone, the sentence of Borstal training must itself be quashed.

Sentence quashed.

Solicitor: The Solicitor, Metropolitan Police, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND MR. JUSTICE BARRY

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KENNETH FRANCIS CHANDOR

Children—Indecent Assault—Alleged Series of Assaults on Several Children—How Far Succession of Cases may be Regarded in Determining Truth of any One Incident—Schoolmaster and Pupil.

The passage in the judgment in CAMPBELL (40 Cr.App.R. 95 at p. 102; [1956] 2 K.B. 432 at p. 438) which states that in cases of alleged sexual assaults on a number of children, where the evidence of each child deals only with the assault on himself or herself, " a jury may be told that a succession of these cases may help them to determine the truth of the matter provided that they are satisfied that there is no collaboration between the children to put up a false story " is not of universal application. There are many cases in which evidence of a succession of incidents may properly be admissible to help to determine the truth of any one incident, *e.g.*, to prove identity, intent, guilty knowledge or to rebut a defence of innocent association; but evidence of a succession of incidents cannot be relevant where the defence is that the meeting or occasion for an incident in question never took place at all.

Semble, with regard to the defence of innocent association,

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in the case of a schoolmaster and his pupil there may be nothing suspicious in the association which calls for any explanation.

Appeal against conviction.

The appellant was convicted at Croydon Borough Quarter Sessions on October 18, 1958, on five charges of indecent assault on boys and was sentenced by the Recorder (R. M. Wilson, Esq., Q.C.) to concurrent terms of six months' imprisonment.

The appellant, a man of 29 of excellent character, was a schoolmaster at a secondary boys' school and the alleged offences involved three different boys, aged between 13 and 15, and were committed at various dates between May, 1956, and June, 1958. The appellant's case was that none of the alleged incidents had taken place. In one case he denied that he had ever met the boy at a place in the Lake District where the boy said the offence had been committed; in other cases the appellant said he had been in the company of the boys at the time and place where the offences were alleged to have been committed, but that there had not been any sort of indecency or anything which might have been misconstrued as indecency. The material facts and the summing-up of the Recorder are set out in the judgment.

N. N. McKinnon, Q.C. (*Daniel A. Hollis* with him), for the appellant. These counts could be tried together only by virtue of the Indictments Act, 1915. The evidence in support of any one count was not relevant on any other count. The jury should have been so directed: see BAILEY, 18 Cr.App.R. 42; [1924] 2 K.B. 300. Although BAILEY (*supra*) was disapproved in SIMS, 31 Cr.App.R. 158; [1946] K.B. 531, it was expressly approved by Viscount Simon in HARRIS, 36 Cr.App.R. 39 at p. 59; [1952] A.C. 694 at p. 712. The Recorder followed the direction laid down in CAMPBELL, 40 Cr.App.R. 95 at p. 102; [1956] 2 Q.B. 432 at p. 438. This was a misdirection. It is *obiter* and inconsistent with an earlier passage in CAMPBELL (40 Cr.App.R. at p. 100; [1956] 2 Q.B. at p. 437): "The

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latter . . . could be tendered to corroborate the evidence of A and need not, and indeed could not, be asked any questions in chief as to the assault on him." Further, it wholly undermines any warning with regard to the absence of corroboration.

If a schoolmaster's association with his pupil is an "innocent association" which can be rebutted by evidence of other boys of what happened on other occasions, then no schoolmaster can, henceforth, defend himself against false charges.

J. L. E. MacManus for the Crown.

The Recorder, after giving a correct warning on corroboration, expressly followed the direction laid down in CAMPBELL (*supra*) with regard to the relevancy of the evidence of other cases when considering any one specific case, and in substance adopted the language of this court in that case. The Crown rely on that case as having been correctly decided.

THE LORD CHIEF JUSTICE: This appellant was convicted at Croydon Borough Sessions of five offences of indecent assault on boys and was sentenced to six months' imprisonment on each count concurrently. He now appeals against his conviction, alleging a misdirection by the learned Recorder.

The appellant is a man of 29 of excellent character. He was a schoolmaster at a secondary boys' school at Croydon, and the alleged offences took place on five occasions between May, 1956, and June, 1958, on three different boys aged 13 to 15 years. His defence from the outset and at the trial was that the alleged incidents never took place at all and that the boys' stories were merely products of their imagination. It is clear, therefore, from what I have said, that a most careful direction was needed on the admissibility of evidence of other incidents in determining the truth of any one incident.

In the course of his summing-up the learned Recorder, as indeed was right, pointed out that there was no corroboration at all in this case and he gave the jury the usual warning. He then continued in these terms: "Where there is a series of these incidents deposed to by witnesses of this kind, where

you are told that a succession of these incidents happened, it may help you to determine the truth of the matter, provided that you are satisfied that there is no collaboration between the children to put up a false story. That is what the Court of Criminal Appeal has laid down in 1956 as a proper direction to give to a jury. You are entitled to take into account what Smith and Whibley have said in considering the evidence of Edwards, not as corroboration of what Edwards has said, because if there are a series of these incidents you may probably take the fact that there have been other incidents deposed to to help you to dispose satisfactorily of the issue, provided you are satisfied there has not been any collaboration between the children to put up a false story." A little later on he said: "I should also tell you there is another phase of the present case which you are entitled to take into account in dealing with any one incident; for example, in one of the assaults deposed to by Edwards you are entitled to take the evidence of the other witnesses into account, and that is in relation to any case where it can be said that the real defence was not 'I was not there; I never was anywhere near the place,' but that this was a perfectly innocent meeting with the boy; you are entitled to take that into account to see whether that rebuts the defence of innocent behaviour."

Those two passages in the summing-up were undoubtedly based on a passage in the judgment of the court in CAMPBELL, 40 Cr.App.R. 95; [1956] 2 Q.B. 432. That was a case dealing only with questions of corroboration, but at the end of the judgment Lord Goddard C.J. added this (40 Cr.App.R. at p. 102; [1956] 2 Q.B. at p. 438): "As we are endeavouring in this judgment to deal comprehensively with the evidence of children, we may perhaps endeavour to give some guidance to courts who have from time to time to deal with cases of sexual assaults on children where the evidence of each child deals only with the assault on himself or herself. In such cases it is right to tell a jury that because A says that the accused assaulted him, it is no corroboration of his evidence that B says that he was also the victim of a similar assault though

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both say it on oath. At the same time we think a jury may be told that a succession of these cases may help them to determine the truth of the matter provided that they are satisfied there is no collaboration between the children to put up a false story. And if the defence is one of innocent association by the accused with the children, SIMS, 31 Cr.App.R. 158; [1946] K.B. 531, subsequently approved on this point by the House of Lords in HARRIS *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 36 Cr.App.R. 39; [1952] A.C. 694, shows that such evidence can be given to rebut the defence."

Now the first part of that passage before the reference to a defence of innocent association is in very general terms. Unqualified, it would appear to cover a case where the accused was saying the occasion for the incident in question never took place at all. To take an incident in the present case, the appellant said that in respect of an alleged offence with a boy at View Point, he had never met the boy at View Point at all. Yet, if this passage in CAMPBELL (*supra*) is unqualified, it would apply to just such a case. We do not think that the passage in CAMPBELL (*supra*) was ever intended to cover that. Indeed, so far as we know the authorities have never gone as far as that, nor do we see how they could. Evidence that an offence was committed by the accused against B at Croydon could not be any evidence that the accused met A in the Lake District and committed an offence there. There are, of course, many cases in which evidence of a succession of incidents may properly be admissible to help to determine the truth of any one incident, for instance, to prove identity, intent, guilty knowledge or to rebut a defence of innocent association. On such issues evidence of a succession of incidents may be very relevant, but we cannot say that they have any relevance to determine whether a particular meeting or occasion for an incident ever occurred at all.

That really is sufficient to dispose of this case, and it is unnecessary to deal with the second passage in the summing-up in respect of a defence of innocent association. We would only observe that in the case of a schoolmaster and his pupil there

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may be nothing suspicious in the association which calls for explanation. However, having regard to the view we have taken as to the passage in CAMPBELL'S case (*supra*) and the summing-up based thereon, it is unnecessary to deal with that. It follows that the conviction must be quashed and the appeal allowed.

Conviction quashed.

Solicitors: Wilders & Sorrell for the appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND MR. JUSTICE McNAIR

JOHN CUNNINGHAM

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Provocation—Defence Limited to Charge of Murder.
Evidence—Character of Prisoner—Imputation on Crown Witness—Suggestion of Invitation to Homosexual Practices — Prisoner Cross-Examined on Previous Convictions — Admissibility — Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1, *proviso* (*f*) (ii).

The defence of provocation arises only on a charge of murder, and does not arise on a charge of wounding or any other charge.

The appellant was about to dismount from an omnibus when a passenger, whom he knew, made a remark to him of apparently quite an ordinary and innocent nature, whereupon the appellant violently attacked the passenger. On the trial of the appellant for unlawful wounding, it was suggested in cross-examination to the passenger that his remark was in reality an invitation to the appellant to indulge in homosexual practices with him, and that the appellant had been provoked by the invitation into the attack. The passenger denied the suggestion. When the appellant gave evidence he was, by

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permission of the judge, cross-examined on his previous convictions. He was convicted and on appeal it was contended on his behalf that, assuming that provocation could be a defence to the charge, the question put to the passenger in cross-examination did not involve such an imputation on his character within the meaning of proviso (*f*) (ii) to section 1 of the Criminal Evidence Act, 1898, as would render the previous convictions of the prisoner admissible if he gave evidence.

Held, that as no defence of provocation arose in this case and as there was no other defence, the cross-examination of the prisoner on his previous convictions could have made no difference.

Semble, even if the defence of provocation did arise, a question of the nature put to the witness in this case would render the prisoner liable to be cross-examined on his previous convictions.

Appeal against conviction and sentence.

The appellant was convicted at Worcestershire Quarter Sessions on October 2, 1958, of unlawful wounding and was sentenced by the Deputy-Chairman to five years' imprisonment.

The appellant was about to dismount from an omnibus on which he was riding when a passenger named Trueman, whom he knew, said to him: "Oh, you are getting off here, Jack; I thought you were coming to Droitwich with me." The appellant thereupon made a violent attack on Trueman. At the trial it was suggested in cross-examination to Trueman that he meant and the appellant understood him to mean that they were to go off together and indulge in homosexual practices. This Trueman vehemently denied. When the appellant gave evidence he was, by permission of the Deputy-Chairman, cross-examined on his previous convictions for violence.

R. H. Tucker for the appellant. The cross-examination of the appellant on his previous convictions was inadmissible. Assuming that provocation could be a defence to the charge, the appellant should not have been shut out of developing his defence by putting it to Trueman in cross-examination. This

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was, in effect, all that he was doing. The matter put to Trueman related strictly to the matters in issue, and was not an imputation on his general character outside those matters. [He referred to STIRLAND *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 30 Cr.App.R. 40; [1944] A.C. 315.]

Malcolm Ward, for the Crown, was not called on to argue.

THE LORD CHIEF JUSTICE: This appellant was convicted at Worcester County Quarter Sessions of malicious wounding and he was sentenced to five years' imprisonment. He now appeals to this court against his conviction and his sentence.

The short facts were these: The appellant was apparently travelling on a bus with his dog and had a cane or a whip with him, and as he moved to get off the bus he passed another passenger called Trueman, and, according to the appellant, Trueman said: "Oh, you are getting off here, Jack; I thought you were coming to Droitwich with me." Thereupon the appellant made a most savage attack on Trueman, hitting him about the face, and as a result Trueman had a wound in the ear, abrasions on the hand and wrist, and an injury to the left eye.

The defence put up at the trial was that that remark made by Trueman was intended as a suggestion that he, the appellant, should go with Trueman and commit some homosexual offence, and it was by reason of that that he was provoked, as he said, and attacked Trueman. In the course of the trial, Mr. Tucker, his counsel, in cross-examining Trueman, said this: "I must suggest that by that remark you meant and he understood you to mean that you were to go together and behave in a homosexual manner? (A.) Well, really that is fantastic, and I think that it is incredible, because do you think," and thereupon the Deputy-Chairman quite rightly interrupted and said: "Mr. Tucker, do you realise where this is leading to?" Mr. Tucker persisted and went on a little later: "Did I have your answer to that question? (A.) I said that it would be incredible that I should make any suggestion of any kind." Then the Deputy-Chairman wrote down the

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answer: "I did not suggest that he should go to Droitwich and behave in a homosexual manner." As the result of that, when the prisoner went into the witness-box the prosecution sought to cross-examine him on his previous convictions, and the Deputy-Chairman allowed that to be done, with the result that previous convictions for violence, no less than four in number, were brought out and were before the jury.

The appeal is based on the ground that leave to the prosecution to cross-examine the prisoner on his previous convictions ought not to have been granted. The way in which that argument is put forward is this: that if provocation was a proper defence in a charge of this sort, then counsel must be, so it is said, allowed to put that question to the complainant, the victim, without having the prisoner's convictions brought out in court. It seems to the court that it is unnecessary to determine that question, though I confess for myself I think that, even if provocation was a proper defence, a question such as was put in this case must of necessity let in the character of the prisoner. It is unnecessary to decide that in this case, because the court is quite clearly of opinion that in such a case as this, a case of malicious wounding, there is no such thing as a defence of provocation. The defence of provocation arises only in a murder case as a defence which will reduce murder to manslaughter. That, it seems to us, is made perfectly clear by Lord Simon in HOLMES *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 31 Cr.App.R. 123; [1946] A.C. 588. At pages 139 and 598 of the respective reports he says this: "The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self control whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived." There, it seems to the court clear, Lord Simon was dealing and dealing only with a defence of provocation in a murder case. The matter is put perfectly clearly by him where, after referring to the fact that provocation may reduce murder to manslaughter, he goes on (31 Cr.App.R. at p. 142; [1946] A.C. at p. 601): "In the case of lesser crimes,

provocation does not alter the nature of the offence at all: but it is allowed for in the sentence."

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Accordingly, in the judgment of this court, the defence of provocation was not open to the appellant, and if the defence of provocation was not open to him there was no defence, and the fact that his convictions were before the jury could have made no difference at all.

I should mention that there is yet another difficulty in the way. Even if provocation could be a defence in such circumstances, there is no suggestion that words alone except under the Homicide Act, 1957, are sufficient to found a defence of provocation. For these reasons the appeal against conviction is dismissed.

As regards the appeal against sentence, it is true that the appellant received the maximum sentence, but having regard to his record of violence there is no surprise in that. Both appeals accordingly are dismissed.

Appeal dismissed.

Solicitors: Philip Baker & Co., Birmingham, for the appellant; T. Horton & Sons, Bromsgrove, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND MR. JUSTICE McNAIR

EDWARD WINDSOR COX

1958
Dec. 15

Sentence — Corrective Training — Requirement of Two Previous Convictions—Prisoner Placed on Probation—Two Subsequent Convictions at Different Courts — Prisoner Brought Back to Receive Sentence — Eligibility for Corrective Training — Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), ss. 8 (5), 21 (2).

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By section 8 (5) of the Criminal Justice Act, 1948: "Where it is proved to the satisfaction of the court by which a probation order . . . was made, . . . that the person in whose case that order was made has been convicted and dealt with in respect of an offence committed during the probation period, . . . the court may deal with him, for the offence for which the order was made, in any manner in which the court could deal with him if he had just been convicted by or before that court of that offence."

In June, 1958, the appellant pleaded Guilty at quarter sessions to housebreaking and was placed on probation for three years. On two occasions in August, 1958, he committed offences of larceny and was convicted and sentenced to imprisonment at different courts. In September, 1958, in view of his breach of probation, he was brought back to quarter sessions to receive sentence for the original offence, and was sentenced to corrective training, for which he became eligible only if the two convictions after he was placed on probation were taken into account.

Held, that in view of the language of the above subsection, quarter sessions were entitled to take those two convictions into account and to pass a sentence of corrective training accordingly.

Appeal against sentence.

The appellant pleaded Guilty at Bedfordshire Quarter Sessions on June 23, 1958, to housebreaking and larceny and was placed on probation for three years. Subsequently he stole 9s. from a meter, for which he was sentenced to three months' imprisonment, and tins of fruit from a lorry, for which he was sentenced to six months' imprisonment. The convictions took place on different occasions in August, 1958, and at different courts. The appellant, in view of his breach of probation, was brought back to Bedfordshire Quarter Sessions, where, on September 1, 1958, he was sentenced by the chairman (J. G. S. Hobson, Esq., Q.C.) to three years' corrective training for the original offence. When the original offence was committed the appellant was not eligible for corrective training; he became eligible only if the two offences committed after he was placed on probation were taken into account.

No counsel appeared.

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THE LORD CHIEF JUSTICE: This appellant pleaded Guilty in June, 1958, at Bedfordshire Quarter Sessions, to housebreaking, and a probation order was made for three years. Thereafter he was in trouble twice. He stole 9s. from a meter at his lodgings. That was not discovered at once, but ultimately he was given three months' imprisonment for that, and on August 15, with four other men, he was caught stealing tins of fruit from a parked lorry, and for that he was sentenced to six months' imprisonment. He was later brought back before quarter sessions in respect of the breach of the probation order, when the chairman sentenced him to three years' corrective training, and it is against that sentence that the appellant appeals to this court.

The only point in this case arises from the fact that at the time when the original offence was committed for which he was put on probation he did not qualify for corrective training, but only qualifies if one takes into consideration the two offences committed after he was put on probation. Accordingly, the point is whether it was correct to sentence him to corrective training for an offence for which in fact he could not originally have been given corrective training. It seems to the court that the point is entirely covered by section 8 (5) of the Criminal Justice Act, 1948, which provides that in such a case as this the court may deal with the offender for the offence for which the sentence was passed in any manner in which the court could deal with him if he had just been convicted by or before that court of that offence. It seems to this court that that subsection entirely covers this case and that in principle it is right, because, when a court sentences a man, it must sentence him in the light of all the knowledge which the court then has, which in this case would include the fact that since he was put on probation he had twice been sentenced to imprisonment. Accordingly, this appeal is dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND MR. JUSTICE McNAIR

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ERIC JOSEPH LASHBROOKE

Plea—Indictment Containing Three Counts—Plea of Guilty to Two and Not Guilty to One—Jury Present in Box but not Sworn During Arraignment—No Objection by Defending Counsel or Request to Court for Specific Warning—Whether Validity of Conviction Affected.

The appellant was arraigned on an indictment containing three counts. He pleaded Guilty to the first and third and Not Guilty to the second. During the arraignment there were twelve jurors in the box waiting to be sworn. After the plea they were sworn to try the second count. No objection was made by defending counsel, nor was any juror challenged. Defending counsel did not ask the judge to give the jury any specific warning to disregard the pleas on the first and third counts. The jury convicted on the second count.

Held, that if what had happened was to be regarded as an irregularity, it was the duty of defending counsel to direct the attention of the court of trial to it timeously and, as that had not been done, the court would not interfere with the conviction on appeal.

DARKE (1937) 26 Cr.App.R. 85 distinguished.

NEAL, 33 Cr.App.R. 189; [1949] 2 K.B. 590 referred to.

Appeal against conviction and sentence.

The appellant was convicted at Cheshire Quarter Sessions on April 16, 1958, of shopbreaking and larceny, having pleaded Guilty to other counts in the indictment which charged him with shopbreaking and larceny and shopbreaking with intent to steal. He was sentenced by the chairman to concurrent terms of four years' imprisonment.

At the time when the appellant was arraigned there were

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twelve jurors in the box waiting to be sworn. At the conclusion of the plea they were sworn and proceeded to try the appellant on the count to which he had pleaded Not Guilty. No objection was made by defending counsel nor was any juror challenged. Defending counsel did not ask the chairman to give the jury any specific warning to disregard the pleas of Guilty on the other counts.

Neil Butter for the appellant. There was here an irregularity in the trial which went to the root of the conviction. Through the appellant's plea of Guilty to counts 1 and 3 the jury must have been aware of the appellant's antecedents when they were trying him on count 2. No warning was given to the jury by the chairman that, when answering count 2, they must disregard the appellant's pleas on the other counts. [He referred to DARKE (1937) 26 Cr.App.R. 85.]

D. Morgan Hughes for the Crown. This case can be distinguished from DARKE (*supra*) because there the jury had been already sworn when the pleas of Guilty on certain counts were mentioned. In the present case no objection was taken at the time to the course which was adopted nor was there any request on behalf of the defence that the jury should be discharged.

THE LORD CHIEF JUSTICE: This appellant appeals to this court both against conviction and sentence.

The matter arises in this way: He was indicted before the County of Chester Quarter Sessions on an indictment containing three counts. To counts 1 and 3, which concerned shopbreaking and larceny in one case and shopbreaking with intent in the other, he pleaded Guilty. To the second count, which was again a charge of shopbreaking and larceny, he pleaded Not Guilty. At the time when he did that there were twelve persons in the jury box ready to be sworn. After the appellant's plea of Not Guilty on the second count they were sworn and he was tried and duly convicted. He was sentenced to four years' imprisonment on each count to run concurrently.

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In those circumstances Mr. Butter, who has argued this case very well, has asked this court to quash the conviction on the second count on the ground that the jury must have known the appellant's antecedents through his plea of Guilty to the other two counts and that they were not warned by the chairman that they ought to disregard any knowledge they had in regard to those pleas.

One thing is perfectly clear, and that is that it is quite impracticable to ensure that no person who subsequently is sworn as a juryman knows nothing about the case. Even if the jury, as commonly they are, are waiting to be sworn and at the back of the court, they may well, if they are listening, hear pleas of Guilty. To suggest that they should be kept outside the courtroom altogether is, we think, perfectly idle. Indeed, even if they were, they might have read about proceedings in the magistrates' court or about sentences already imposed on pleas of Guilty. Nor do we think that it can be said that in every case where a juryman might have some knowledge of the prisoner's antecedents a warning should be given that the jury are to disregard them. Indeed, there may be many cases where to draw attention to that would do more harm than good. After all, most juries by now know that they are to decide the case on, and only on, the evidence given before them. Of course, the position may well be different after a jury have been sworn. Indeed, that was the position in DARKE (1937) 26 Cr.App.R. 85, to which the court has been referred. In that case the Clerk of the Peace, in giving prisoners in charge to the jury, informed the jury that the two prisoners were charged on an indictment containing three counts, to two of which they had pleaded Guilty. This court in that case said, what is undoubtedly true, that that course taken by the clerk was highly irregular. Again, even if a prisoner charged on three counts and having pleaded originally Not Guilty then proceeded to change his plea on two of the counts to Guilty, it could not be suggested that the jury had to be discharged and the trial continued before a fresh jury. Provided the counts are properly joined there is, in the

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opinion of this court, nothing to prevent the trial going on, though no doubt in such a case the judge or recorder or chairman would warn the jury that they must deal with each case separately.

So far as the present case is concerned, it is perfectly clear that the prisoner and his counsel knew full well that there were twelve persons in the jury box waiting to be sworn who had heard the pleas, yet no juryman was challenged, nor was objection taken by counsel, nor did counsel invite the chairman to give any specific warning to the jury, all of which shows that he, at any rate, did not think that there was any irregularity or that there would be any prejudice to the prisoner. Indeed, if he had, it would have been his duty to draw the attention of the chairman to the fact. It was said in NEAL, 33 Cr.App.R. 189, at p. 195; [1949] 2 K.B. 590, at p. 597, by Lord Goddard: "We desire, however, to emphasise that if an irregularity arises in a trial which can be cured and it is not brought timeously to the attention of the court of trial, it does not by any means follow that this court will allow advantage to be taken of it when it is too late to remedy it except by quashing the conviction." In the circumstances of this case the court sees no ground whatsoever to interfere.

As regards sentence, these were serious offences, the victims in each case being small shopkeepers, and in offences of that sort this court would be very loth to reduce the sentence. However, in the present case there is this fact, that though this man of fifty years of age has a bad record, it was mainly before 1948. Indeed, out of twelve convictions nine were before 1939; but since 1943, at any rate, the only offence for which he has been sentenced was gambling prior to bankruptcy, a bankruptcy offence which did not involve any dishonesty; so that between 1948 and 1955, when there was a warehouse-breaking which was taken into consideration in the present case, the appellant had apparently run straight. In those circumstances, bearing that in mind, the court feel that they can in the present case reduce the sentence of four

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years' imprisonment to one of two years' imprisonment concurrent on each count with an order under section 22.

Appeal against conviction dismissed. Sentence reduced.

Solicitors: Field, Roscoe & Co., agents for Keith Moore, Birkenhead, for the appellant; Kinch & Richardson, agents for Percy Hughes & Roberts, Birkenhead, for the Crown.

CENTRAL CRIMINAL COURT CASE

BEFORE

MR. JUSTICE GORMAN

1958
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R. *v.* ATTARD

Evidence—Hearsay—Interpreter—Statement by Prisoner to Police Officer through Interpreter — Admissibility of Evidence of Police Officer.

The prosecution proposed to call evidence by a police officer of an interview which he had conducted with the prisoner through an interpreter. The defence submitted that, since neither the police officer nor the prisoner could understand what the interpreter said to the other, the evidence of the police officer was inadmissible as being hearsay, and that only the interpreter could give evidence of the questions which he put to the prisoner on behalf of the police officer and of the answers given to him by the prisoner in the prisoner's own language.

Held, that the submission was correct and that the evidence of the police officer in relation to the interview was inadmissible.

Trial at the Central Criminal Court before Gorman J. and a jury.

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R. *v.*
ATTARD

Gorman J.

The prisoner, Anthony Attard, a Maltese, who did not speak and did not understand English, was charged with murder. During the course of the case for the prosecution the Crown proposed to call evidence by a police officer, Det.-Superintendent William MacDonald, of an interview which he had conducted with the prisoner through an interpreter.

Edward Clarke (*Brendan Shaw* and *Audrey Jennings* with him) for the defence. The evidence of the superintendent is inadmissible as being hearsay. He spoke English only and the prisoner Maltese only, and the only person who spoke and understood both languages was the interpreter. The prisoner understood neither the questions put to the interpreter in English nor the subsequent translation into English of his own answers. Consequently, these questions and answers were not statements made in the presence and hearing of the prisoner. The only valid witness with regard to the interview is the interpreter.

Christmas Humphreys (*J. Mervyn Griffith-Jones* with him) for the Crown. The evidence of the superintendent is admissible for four reasons: (i) this point has never been taken before; (ii) if the point were good, it would mean a profound change in the administration of the law; (iii) interpreters are in a different position from that of police officers; they are impartial, mere cyphers, and are not expected to take an intelligent interest in the proceedings; (iv) the rule with regard to the exclusion of hearsay evidence is not absolute. A number of exceptions have come to be recognised in practice, *e.g.*, a man's evidence with regard to his own age, and this comes under the head of the recognised exceptions.

Edward Clarke, in reply. The first two points urged by the Crown do not make the argument for the defence any better or worse. On the third point, an interpreter is obviously a person who must use his intelligence and be ready to give evidence concerning inflections and matters of that kind in both languages, if necessary, and is a fully competent witness. The last point concedes that the evidence of the

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superintendent offends against the rule excluding hearsay evidence and it would be wrong at this stage to introduce a further exception to that rule.

GORMAN J.: This is a submission in law which I have never known to be taken before, though maybe it has been taken and has not been reported, but that in itself is not a reason for refusing to allow a submission, if the submission is right.

The short point of the submission, as I understand it, is this. It is conceded for the purposes of the argument that the prisoner does not know, understand or speak English at all. There were present at an interview, at the first stage, the prisoner and the detective-superintendent. At a further stage the detective-superintendent thought it right to get the services of an interpreter in order that there might be no mistake with regard to what was said. Thereafter the interview went on in this way: a question was put by the superintendent in English, that was then translated into Maltese, and, that having been done, the prisoner answered the question in Maltese. The answer was then translated into English by the interpreter, and then the superintendent, having put the question in English and having got through the interpreter the answer in English, made a note of what was said to him by the interpreter. There may also have been in the course of the interview statements made by the prisoner in Maltese which were not the direct result of questions put to him through the interpreter by the superintendent, and those statements, too, were translated into English by the interpreter, and the superintendent, having heard them, made a note of them.

It is sought here by the prosecution to ask the detective-superintendent to tell us that which he in fact wrote down at the time. It is said by Mr. Edward Clarke that, when there is an interview of that kind, the best person, or the nearest person to the prisoner, is the interpreter, and the interpreter, he does not dispute, can be called to say: "I heard the

detective-superintendent put the question. I then translated that question. I said this to the prisoner and the prisoner said this to me"; the interpreter being asked as a sort of intermediary between the non-English-speaking prisoner and the English-speaking detective-superintendent. Mr. Humphreys said that the point has not been taken before, that the general method of the taking of statements when an interpreter is necessary has been followed in this case, and that it is a mistake for Mr. Edward Clarke to say that this practice offends against the rules of evidence. The interpreter, says Mr. Humphreys, is not in the nature of a police officer, but a mere cypher who hears translations and then gives them back in the English language.

This point is a novel one, but I do not think that it is a point which can be lightly dismissed here. The fact that I have not heard it taken before is not evidence that the point has never before been taken. In my opinion, there is some force in the submission made here by the defence and I am going to say no more about it. In my opinion, in all the circumstances here the submission made by the defence is a correct one and the evidence ought not to be given through the mouth of the detective-superintendent in the witness-box.

Solicitors: Good, Good & Co. for the prisoner.

NOTE

As a result of this decision, the Home Office, at the suggestion of the Director of Public Prosecutions, has sent out a circular letter to Chief Officers of Police stating that "it will be necessary in similar cases in the future to ensure that the interpreter is available to give evidence as to oral statements made by the accused, as is already done in the case of written statements. It will be desirable that, whenever practicable, the interpreter should make his own notes of the interview for use in the event of his being called to give evidence. Failing this, the interpreter should be asked to initial the record of the interview made in the notebook of the police officer conducting the interview, so that it can be used by the interpreter to refresh his memory when giving evidence."

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DONOVAN AND MR. JUSTICE ASHWORTH

1959
Jan. 26

ERNEST RAYMOND JONES

Capital Murder—"Murder Done in the Course . . . of Theft"—Theft Already Completed—Murder Committed to Effect Escape and Avoid Detection—Homicide Act, 1957 (5 & 6 *Eliz.* 2, *c.* 11), *s.* 5 (1).

Where a thief or burglar, after the completion of the theft, in order to effect escape and avoid detection, kills a person who has appeared on the scene, this is "murder done in the course . . . of theft" within the meaning of section 5 (1) of the Homicide Act, 1957, and, accordingly, capital murder.

Direction of Lord Sorn in LORD ADVOCATE *v.* GRAHAM, 1958 Sc.L.T. 167 at p. 170 followed.

Appeal against conviction.

The appellant was convicted at Leeds Assizes on December 10, 1958, of capital murder and was sentenced by Hinchcliffe J. to death.

At about 9 p.m. on September 30, 1958, the appellant broke into the shop of a Co-operative Society near Huddersfield. He went upstairs, where he knew there was a safe, which he found to be open. He took silver and notes from the safe and put them into his pocket. As the appellant was about to descend the stairs, the manager, returning to lock up the safe, put on the lights, and as the manager neared the top of the stairs the appellant struck him a fatal blow.

Bernard Gillis, Q.C. (*Lionel H. Scott* with him), for the appellant. The evidence showed that, at the time when the appellant struck the manager, he had completed the theft and was preparing to leave the premises. This defence of the appellant was not adequately put before the jury in the summing-up. Further, the theft having been completed, the

murder was not done " in the course or furtherance of theft " within the meaning of section 5 (1) of the Homicide Act, 1957.

Geoffrey de P. Veale, Q.C., and *R. Withers Payne* for the Crown were not called on to argue.

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THE LORD CHIEF JUSTICE: This appellant was convicted at Leeds Assizes of capital murder and he now applies for leave to appeal against his conviction.

The facts are in a very short compass. On September 30, 1958, about 9 p.m., he broke into a Co-operative Society Stores near Huddersfield. He collected downstairs some cigarettes, which he put into a carton ready to take away from the premises. He then went upstairs where, as the result of a previous successful burglary, he knew there was a safe. To his surprise he found that the safe was open. He took silver and notes, amounting to about £70, out of the safe and put it all, or most of it, into his pocket. As he was about to descend the stairs, he heard a click of the front door and the lights downstairs went on. He took refuge behind some sacks of flour. In fact the man who had come into the premises was Mr. Turner, the manager of the store, and he came up the stairs in order to close the safe. When he was near the top of the stairs he received a blow from the appellant, as a result of which he died, and it was found that his skull was fractured in five places.

The appellant's first defence was based on an alibi, but that was not pursued. At the trial his case was that he had merely pushed the manager, who must have struck his head and fractured his skull in falling. At any rate, his case was that he had no intention of doing Mr. Turner grievous bodily harm let alone committing murder, and finally that, even if it were held that his acts constituted murder, yet it was not murder done in the course or furtherance of theft, so as to constitute capital murder within the meaning of the Homicide Act, 1957.

As regards the defence that he had no intention to inflict grievous bodily harm or murder, it is enough to say that no

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complaint is made whatsoever of the very careful directions given by the learned judge both on the law and on the facts. It is sufficient to say that there was ample evidence on which the jury could come to the conclusion that this was murder and not manslaughter. The real point taken on this appeal concerns the question whether the murder was committed " in the course or furtherance of theft " so as to constitute capital murder. It is said that if the appellant were to be believed, the theft was complete. His case was that, having found the safe open, he thought somebody had been there recently, that he took fright, that he took what money he could immediately lay his hands on and decided then and there to leave the premises without looking round for anything else to take and without even collecting the cigarettes which he had put aside. In other words, his case was that he took fright and that, quite apart from the clicking of the front door, he had determined to go.

It is said that that defence was never adequately put to the jury. In the view of this court the defence was put, true not in very great detail, but it was adequately put. But the matter does not end there, because even if this was a case in which the defence had not been properly put, it does not seem to this court that the argument is sound that, if a man may be charged with thieving the offence is complete for all purposes, so that if thereafter in an attempt to avoid detection he strikes somebody and commits murder that it is not capital murder. This was a case where the appellant was caught, if one may use the expression, red-handed, and in order to avoid detection and while still on the scene of his theft he commits murder. It is difficult to see why that should not be within the words " in the course . . . of theft."

The court has been referred to a decision in Scotland and to the summing-up of Lord Sorn in H.M. ADVOCATE *v.* GRAHAM, 1958 Sc.L.T. 167. The facts do not matter, but in the course of summing up Lord Sorn said this (at p. 170): " Now you have just heard it suggested to me by counsel for the defence that murder is only done in the course of theft

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if the man did it in order to get on with the theft after he had done the murder. I think that was the suggestion. I have only got to tell you that I do not agree with that. It is a question of what is meant by the course of a theft, and I think that the course of a theft is begun when perpetration is begun; that is to say that it covers the period of attempt as well as the period of completion; the attempt of the crime as well as the crime; and I say that if a burglar is interrupted in that course, the course of perpetration, and if he murders even in order to get away, not with the idea of going on, but with the idea of getting away, it still is murder done in course of theft. It would be, I think, somewhat ridiculous to suppose that Parliament has said 'We will make it murder if the householder who wakes up and goes to interfere with a burglar gets killed by a burglar who kills him in order to go on with his stealing, but we won't make it capital murder if the burglar murders him in order to run away.' I think it does not matter what he was going to do afterwards; or what he did afterwards; if he was in course of theft and he did the killing, it is 'in course of' within the meaning of section 5 of the Homicide Act; and I so direct you in law."

In the view of this court, that summing-up of Lord Sorn was perfectly correct and the court agrees with what Lord Sorn there said. The court would only add that for the purposes of this case it has only been necessary to consider the words "in course of theft" and not the further words "or furtherance of theft"; the consideration of the whole of those words together remains for another occasion. In these circumstances the court is clearly of opinion that this appeal must be dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DONOVAN AND MR. JUSTICE ASHWORTH

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Feb. 2

BADEN GEOFFREY CLUCAS
GEORGE PETER O'ROURKE

Gaming—Fraud in Wagering—Loss Incurred under Credit Betting Arrangement with Bookmaker—Intention to Cheat at Time when Bet Made—No Fraud in Race Itself—Gaming Act, 1845 (8 & 9 *Vict. c.* 100), *s.* 17.

By section 17 of the Gaming Act, 1845: "Every person who shall, by any fraud . . . in wagering on the event of any . . . sport . . . win from any other person . . . any sum of money . . . shall be deemed guilty of obtaining such money . . . from such other person by a false pretence . . ."

The appellants entered into a scheme by which one or other of them rang up a local bookmaker, giving a false name and pretending that he was either a foreman or a person engaged on a works contract and that the men on the site wanted to place bets. The bookmaker was asked to accept the person who rang up as his client under the assumed name for the purpose of placing bets on behalf of workmen and agreed to do so. The appellants accepted any money which arose from winning bets, but never paid losses if these were of any substantial amount, and when the bookmaker asked for payment of losses or demanded a deposit or made further inquiries, the appellants generally moved on to another place.

Held, that the appellants were rightly convicted of fraud in wagering, contrary to section 17 of the Gaming Act, 1845, as they were proved to have been fraudulent throughout in the sense that at the time of the making of bets they intended to accept the money if they won, but not to pay if they lost any substantial amount, and that it was not necessary to constitute this offence that money should have been won through some fraud in the race itself.

LEON, 30 Cr.App.R. 120; [1945] K.B. 136 followed.

Appeals against conviction; and in the case of the appellant Clucas, also against sentence.

The appellants were convicted at Hampshire Quarter Sessions on September 24, 1958, Clucas on seven and O'Rourke

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on six charges of fraud in wagering, contrary to section 17 of the Gaming Act, 1845, and both appellants also on two charges of conspiracy to defraud bookmakers. They were sentenced by the Deputy-Chairman: Clucas to seven years' preventive detention and O'Rourke to two years' imprisonment.

The particulars of the first count alleged that on a day unknown between June 2 and June 16, in the County of Southampton, by fraud in wagering on the events of horse races the appellants won and obtained the sum of £27 19s. 7d. from Leslie Charles Eustace, a bookmaker, by a false pretence. The particulars of counts 2–6 inclusive charged both appellants with similar offences in relation to other sums alleged to have been obtained from bookmakers in the Counties of Southampton and Dorset. The seventh count charged only the appellant Clucas with a similar offence. The eighth count charged both appellants with conspiracy to defraud, the particulars being that on divers days between June 2 and August 2, 1958, in the County of Southampton, they conspired together and with other persons unknown to defraud such bookmakers as should thereafter be induced to bet with them by false representations that they were placing small bets on behalf of a number of persons and that, therefore, credit for substantial sums could be given safely by such bookmakers, whereas in fact they intended to make, and did make, large bets on behalf of themselves alone. The ninth count charged both appellants with a similar offence of conspiracy in the County of Dorset.

The appellants first went to Aldershot and then to other places in Hampshire and Dorset. One or other of them would ring up a local bookmaker, giving a false name and pretending that he was a foreman or a person engaged on a works contract. He would then ask the bookmaker to accept him under the assumed name as his client for the purpose of placing bets on behalf of workmen. If the bet proved to be a winning bet, they collected their winnings; if it proved to be a losing bet, or when the bookmaker asked for the payment on losses or made further inquiries, they usually moved on to some other

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place. On two occasions O'Rourke did pay losses of small amount. O'Rourke was found Not Guilty on count 2.

G. S. Hill for the appellant Clucas.
N. R. Blaker for the appellant O'Rourke.
Michael Lee for the Crown.

The arguments appear from the judgment.

THE LORD CHIEF JUSTICE: These appellants were tried at Hampshire Quarter Sessions on seven substantive offences of fraud in wagering, contrary to section 17 of the Gaming Act, 1845, and also on two charges of conspiracy to defraud bookmakers. The reason why there were two alleged conspiracies was that one course of conduct concerned Hampshire and another course of conduct concerned Dorset. As regards the seven substantive offences both appellants were charged jointly on six of them and Clucas on the seventh.

What happened in this case was this: Clucas, and it is said, and the jury so found, O'Rourke, set about defrauding bookmakers, and there is no doubt that Clucas, at any rate, is a complete menace, as his convictions show and as indeed one of the Law Reports shows: CLUCAS, 33 Cr.App.R. 136; [1949] 2 K.B. 220. Their scheme was this, that they would go to some place—they started, I think, at Aldershot—and one or other of them would ring up the local bookmaker, giving a false name and pretending that he was a foreman or at any rate engaged on some works contract, that the men on the site wanted to place bets, and asking would the bookmaker accept him under the assumed name as his client for the purpose of placing bets on behalf of workmen. It is also quite clear that in all cases these two men never intended to pay losses, if those losses were of any substantial amount. I say that because O'Rourke did pay two small losses. Generally, however, when they won they collected their bets and when they lost they moved on to the next place. Having exhausted Hampshire, they went and did the same thing in Dorset. As soon as a bookmaker asked

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for the payment of losses or asked for a deposit or made further inquiries, they moved on, and it was not until fairly late in the day that the police were brought in and, I think, laid a trap and the appellants were finally caught.

The main point in this appeal taken by both the appellants is that, whatever anybody may think of their conduct and whether it is criminal or not, it does not come within the words of section 17 of the Gaming Act as charged. As I said, they were charged, if I may read the count of the indictment, " with obtaining money by fraud in wagering on the events of horse races, contrary to section 17 of the Gaming Act, 1845."

Section 17 of the Gaming Act is in these words, so far as they are relevant here: " Every person who shall, by any fraud . . . in wagering on the event of any game, sport, pastime or exercise, win from any other person to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence."

It is said that it is necessary in any charge under this section to show that money has been won by fraud as opposed to obtained by a fraud. The winning, it is said, must have been through some fraud in the play, the gamble or the sport, whatever it may be. If I may give an example, it is said that fraud in inducing bookmakers to accept bets as here by pretending they were acting for other people, acting in a false name, and with no intention of paying losses, is not a fraud in wagering; it is said that there must be some fraud in the race itself. It is clear that that is a view which has been taken by certain of the textbooks, in particular Russell on *Crime*, 11th edition, pp. 1373 to 1376. At p. 1376 the author quotes the vital words as these: " Every person who shall, by any fraud, or unlawful device or ill practice . . . win from any other person to himself . . . any sum of money." I venture to think that those are not all the vital words, because what is omitted from that is the fraud which is laid down in the section, namely, either a fraud in playing at the game in question or " in bearing a part in the stakes or wagers, or

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adventures, or in betting on the sides or hands of them that do play, or in wagering." Of course, it is perfectly true that the money is won by the horse winning, but it has been held by this court in a case to which I must refer in a moment, LEON, 30 Cr.App.R. 120; [1945] K.B. 136, that, though that is true, it is enough for a person to be found guilty under this section if there was fraud in the actual wagering. In LEON's case (*supra*) the facts were very much the same. The fraud there consisted in a representation to the bookmakers that the accused had means enough to pay losses of £500 a week. That was a representation which was made dishonestly in order to persuade the bookmaker to accept his bets. Oliver J., a judge, I may say, of very great experience in criminal matters, summed up to the jury in these words: "Do you regard that as money that he had won by cheating in the circumstances of this case?, and before you came to that conclusion, it seems to me that you would have to come to the conclusion that you are satisfied that when he entered into those three sets of transactions he never intended to pay if he lost; that he intended to put the money in his pocket if he won, but he never intended to pay if he lost." There was an appeal to this court, and the decision of the court was given by Singleton J. At p. 129 of the report in the *Criminal Appeal Reports* he refers to the section, and having referred to the relevant words he said this: "It is to be observed that something more than is commonly known as obtaining money by false pretences is contemplated by the legislature." Then, having referred to certain facts, he went on: "The difficulty is to see what 'in wagering' means. For the purposes of this appeal it must be taken that the jury, who had this case before them for some time, were all satisfied that the appellant was fraudulent throughout. Mr. Lincoln cited to us authorities under this section, which were all dealing with games of cards. They were BRIXTON PRISON (GOVERNOR) [1912] 3 K.B. 568 and MOORE (1914) 10 Cr.App.R. 54. In those cases it was said that in a game of cards or a game such as a three-card trick, it was not sufficient to show that there

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was fraud before the game started, but there must be shown fraud in the course of the game itself. Of course, a game of cards is not quite the same thing as wagering. The act of making a wager is done by a word or a few words, an offer and an acceptance. Mr. Slade submitted on behalf of the Crown that unless in the circumstances of this case the offence of fraud in wagering was committed, it was difficult to see when it could be, and, as he remarked, wagering is instantaneous, and he submitted that the circumstances of this case showed that there was evidence on which it was open to the jury to find fraud in wagering." Singleton J. then referred to the words of the summing up, and he went on at the foot of p. 130: "The real question which was put to the jury was: Was the appellant fraudulent throughout?, and they said: Yes, he was. That seems to us to mean, and necessarily to mean, that at the time that the appellant made each of these bets with the bookmaker, he intended to cheat and defraud the bookmaker."

That, as I say, is a decision of this court, but if any members of the court felt that there was any doubt with regard to the conclusion arrived at and the law laid down in that case, the court would adjourn and have a court of five to consider the matter. The court, however, has no reason to think that LEON'S case (*supra*) was wrongly decided.

In the present case it is abundantly clear, if one looks at the moment when these bets were placed, that these appellants were fraudulently representing and continuing the representation that they were acting for a number of men, thus inducing the bookmakers to accept their bets without further inquiry, and also at the time when they placed their bets they had no intention of paying losses. That being so, there was clearly a fraud in wagering within the principle laid down in LEON'S case (*supra*), and the appeal on that ground must fail.

Mr. Blaker, on behalf of O'Rourke, took a number of other points. In particular he maintained that his client had been prejudiced by a ruling admittedly given, but at a very

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late stage, in regard to a statement by Clucas. Clucas had made a statement to the police in which he said that he and O'Rourke were acting together in this matter. In fact no ruling was obtained on the admissibility of that evidence against O'Rourke until after the evidence had been given. No doubt that was because the Deputy-Chairman was not asked to rule on it. When he was asked to do so, he did rule in the presence of the jury that the statement of Clucas was not in any sense of the word evidence against O'Rourke. There followed the speeches of counsel, and in the summing up he went on to say: "You have heard a great deal of discussion in the course of this case about the statement that Clucas made, which has been proved by the police officer. You heard me rule this morning that that statement is no evidence of conspiracy against O'Rourke; it is only evidence against Clucas. On the other hand, you have also heard me rule that in my judgment there is ample evidence for you to consider quite apart from that statement—which you will put out of your minds when you consider the case against O'Rourke—on the conspiracy, and it will be for you to weigh that evidence, the whole of it, and consider Aye or No, does it point irresistibly to one conclusion only." There was thus a clear ruling and a direction to the jury that the statement of Clucas had to be put out of their minds completely when they were considering the case of conspiracy against O'Rourke. They were, however, left, in the opinion of this court, with abundant evidence on which they could hold O'Rourke a party to this conspiracy. Mr. Blaker has pointed out that the pattern of operation of these two men was slightly different, but here were two men living and working together, each apparently found with lists of the other's bets, and broadly speaking the pattern was the same. In the opinion of this court, there was ample evidence on which the jury could convict O'Rourke of conspiracy. For these reasons the court feels that there is nothing in this case and that as regards conviction the appeals fail.

The first appellant, Clucas, also appeals against sentence.

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He was in fact sentenced to seven years' preventive detention concurrent on each count. He is a man of 48. In 1949 he was sentenced to twelve months for conspiracy; in 1950 to two years for attempted false pretences and conspiracy; in 1953 to three years for attempted false pretences; and in 1957 in Scotland to six months for attempted fraud. As has been said before, this man is a menace to bookmakers, and the court can see no reason to interfere with the sentence. Accordingly, the appeal against sentence is also dismissed.

Appeals dismissed.

Solicitor: W. Bradley Trimmer & Son, Alton, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DONOVAN AND MR. JUSTICE ASHWORTH

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WILLIAM ALFRED WOODROW
RONALD JOHN COOPER
BARRY ALAN HARRINGTON

Affray—Indictment—Evidence of Number of People Milling About for Several Hours in Wide Area.

The evidence on the depositions disclosed that a large number of persons, including the appellants, from 8.30 p.m. on August 31, 1958, to about 12.30 a.m. on September 1, 1958, were milling about in and near Bramley Road, North Kensington, over an area of about a quarter-mile radius.

Held, that a count which charged the appellants with affray and in the particulars of offence stated that the appellants "on the 31st day of August, 1958, and the 1st day of September, 1958, in divers streets being public places in the neighbourhood of Bramley Road, in the Royal Borough of Kensington, unlawfully fought and made an affray" was not bad for duplicity and was in proper form.

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WILLIAM ALFRED WOODROW, RONALD JOHN COOPER, BARRY ALAN HARRINGTON

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Appeals against conviction, and in the case of the appellant Woodrow also against sentence.

The appellants were convicted at the Central Criminal Court on September 19, 1958, of making an affray and were sentenced by the Recorder of London, Woodrow to twenty-one months' imprisonment, Cooper to eighteen months' imprisonment, and Harrington to twenty-one months' imprisonment.

The evidence on the depositions disclosed that on the occasion of racial disturbances in the Notting Hill Gate area, between 8.30 p.m. on August 31 and 12.30 a.m. on September 1, 1958, a number of persons, many of them armed, and including the appellants, were milling about over an area of roughly a quarter-mile radius around Bramley Road, North Kensington. Many were voicing sentiments, expressing a desire to fight " niggers " and to attack the police if they interfered. The appellant Woodrow, who was armed with a bit of iron railing, was concerned in an incident at about 8.30 p.m.; Cooper, who was armed with an iron bar, in an incident at about 9.15 p.m.; and Harrington, who used his fists only, in an incident at about midnight.

Martin Graham for the appellants. The count charging affray was bad for duplicity in that it charged the offence as having been committed on different days and in divers streets. Further, this was a case where separate trials should have been ordered, as the incidents in which the three appellants were alleged to have been concerned took place at different times and were quite distinct. Again, the Recorder in his summing-up misdirected the jury by stating in too wide terms the nature of an affray in law; it was not correct to state, as he did, that any disturbance made in public which is calculated to cause alarm may amount to an affray.

Christmas Humphreys, for the Crown, was not called on to argue.

THE LORD CHIEF JUSTICE: These three appellants, together

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WILLIAM ALFRED WOODROW, RONALD JOHN COOPER, BARRY ALAN HARRINGTON

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with some ten others, were tried at the Central Criminal Court for offences arising from racial disturbances in the Notting Hill Gate area. They were charged in the first count in these terms: "You are charged on indictment containing thirteen counts, the first of which charges all of you that on the 31st day of August, 1958, and the 1st day of September, 1958, in divers streets being public places in the neighbourhood of Bramley Road, in the Royal Borough of Kensington, you unlawfully fought and made an affray." Apart from that, in respect of each of the appellants there were other counts for having an offensive weapon and for assaulting the police. In the case of Harrington the only other count was one for assaulting the police.

From 8.30 on the night of August 31 until about 12.30 a.m. on September 1 there were many people, white youths, milling about in the Bramley Road area, broadly speaking within some quarter of a mile radius. Many of them were armed and many of them were out to fight coloured people and they were voicing those sentiments in various terms such as: "We will get the black bastards," and then to the police "Come on you —— coppers, if you want a fight you can have one," and words to the same effect. These three appellants were concerned at different times and, it is said, in different incidents. It seems to the court that here there was really one general incident extending over that period of time. It was joined from time to time by some people and, no doubt, others from time to time departed. These appellants were concerned, as to Woodrow at 8.30, Cooper at 9.15 and as to Harrington about midnight. Woodrow was armed with a bit of iron railing, Cooper with an iron bar, and Harrington used his fists. They were with a group of people voicing those sentiments about coloured folk, and they were threatening to fight any policeman who came near, and in each of those cases where a policeman did come on the scene he fought him.

A number of points are taken on this appeal. It is said, first, that the first count for making an affray, which I have read, is bad for duplicity in that it charges the making of an

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affray on two separate days, August 31 and September 1, and in divers streets being public places in the neighbourhood of Bramley Road. The court is quite satisfied that on the face of it that count is charging one offence because it is perfectly capable of covering the case, which may or may not have been this case, of a body of persons milling from one street to another over a period of time. Accordingly, on the face of it, it seems to the court that this count is good. It may be that it turns out to be uncertain and becomes the subject for particulars, and it seems to the court that in the end the other counts were, in effect, treated as the particulars of the making of the affray. It is to be observed that the Recorder in his summing-up says: "In each of those cases the charges do really all hang together. In other words, the prosecution have pinpointed in those cases actual participation by each of these persons and made a separate charge of it, but the separate charge is really the evidence of the making of the affray." He then goes on to tell the jury that they need only return a verdict on the first count, the making of an affray.

It is then said that there should have been separate trials. The point was taken before the Recorder and was considered by him. It is largely a matter of his discretion and this court can see nothing wrong in the way in which he exercised his discretion, and indeed it seemed the proper course to take. Then it is said that there was a misdirection here as to the nature of an affray, and in particular it is said that the learned Recorder at the outset of the summing-up defined it in too wide terms. He said that an affray is any disturbance made in public either by fighting or in some other way which is calculated to frighten Her Majesty's subjects, and it is said, and I think rightly, that it is not any disturbance that will necessarily make an affray. Here what was alleged was that the affray was by fighting. That appeared in the count of the indictment and, indeed, the learned Recorder three lines after the passage I have read told the jury that in this case the nature of the affray was the fighting.

The court cannot see that there has been any misdirection

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at all by the learned Recorder. Here were these appellants, two out of the three of them, going about with others in the street threatening to fight coloured folk, armed with the weapons to which I have referred, and threatening to fight and fighting the police if they interfered. The only difference with Harrington was that he used his fists, but he was in otherwise exactly the same position.

Finally, it is urged that in regard to Harrington there was not sufficient evidence to support the verdict. The evidence was that he was with a crowd shouting "Let's do the niggers," and that when the police officer interfered he went for him. It is true, apparently, that there was some slight inconsistency between the evidence of the police officers, but this was commented on at the trial and indeed mentioned by the Recorder in his summing-up. It seems to the court that there was ample evidence in Harrington's case to support the verdict.

In those circumstances, these appeals, including the appeal of Woodrow against sentence, are dismissed.

Appeals dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DONOVAN AND MR. JUSTICE HINCHCLIFFE

JOHN FREDERICK WEST

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Sentence—Postponement—Opportunity to Make Restitution.

It is wrong to postpone sentence in order to give a prisoner an opportunity of fulfilling a promise to make restitution.

Appeal against sentence.

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JOHN FREDERICK WEST

Parker L.C.J., Donovan J., Hinchcliffe J.

The appellant pleaded Guilty at Newcastle-under-Lyme Quarter Sessions on April 18, 1958, to forgery, uttering a forged document, and fraudulent conversion. On the appellant offering to make restitution at £3 per week, the Recorder (W. Field Hunt, Esq.) postponed sentence for six months. On October 7, 1958, the appellant appeared before the Recorder for sentence, having by that time not made any payment. The Recorder then passed a sentence of three years' corrective training.

No counsel appeared.

THE LORD CHIEF JUSTICE: This appellant pleaded guilty to four offences of fraudulent conversion, one of forgery and one of uttering a forged document; two other offences were taken into consideration, and he was sentenced to three years' corrective training.

He first came up before Quarter Sessions on April 18, 1958, and the Recorder said this: "You are at present in a reasonably good job, and I think it is a very great pity you are not in a position today to make some offer of restitution, but you are not. I shall postpone sentence for six months, because the suggestion is that you can pay up to £3 a week, and it is accepted that the total sum involved is something just under £60. I cannot order you to repay, but I will postpone sentence if you are willing to promise me to come up for judgment in six months. Are you willing? (The prisoner): Yes." That is just what this court has said ought not to be done. If a prisoner is thought fit to be put on probation, let him be put on probation. If it is not a matter of probation let him be sentenced there and then, but it is highly objectionable to postpone sentence, and at the same time to turn the court into a money-collecting agency. The appellant never did pay anything, but when he was finally brought up he was sentenced to three years' corrective training. This court feels that not only was the original method of dealing with the case quite wrong, but also feels that this is not a case

for corrective training and that in this case they should substitute a sentence of eighteen months' imprisonment, which will date from April 18, 1958.

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Sentence reduced.

CIRCUIT CASE
[NORTHERN CIRCUIT]

BEFORE

MR. JUSTICE ELWES

R. *v.* WATSON AND WATSON

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March 5

Manslaughter—Child—Wilful Neglect—Husband and Wife—Failure to Supply Medical Aid—Children and Young Persons Act, 1933 (23 & 24 *Geo.* 5, *c.* 12), *s.* 1 (1) (2).

The proposition that, where a husband and wife are living together, the wife cannot be convicted of manslaughter by neglect to supply food or medical aid to their child, is not good law; and the decision in FORSYTH (1899) Chester Summer Assizes, in so far as it purports to lay down this proposition, is not to be followed, and the proposition is not supported by SQUIRE (1799) Stafford Lent Assizes, 1 Russ.Cr., 11th ed., 460, or SAUNDERS (1836) 7 C. & P. 277.

Trial at Manchester Assizes before Elwes J. and a jury.

The defendants, Joseph Watson and Marion Watson, who were husband and wife, were jointly charged with the manslaughter of their three-year-old child. The case for the prosecution was that the child died three days after sustaining serious injury from scalding and that the doctor, whose surgery was only three doors away from the defendants' house, was not sent for by either of the defendants until after the child was dead and that in all probability prompt medical attention would have saved the child's life.

At the close of the case for the prosecution, *J. S. Oakes*,

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who appeared for both defendants, submitted that there was no case to go to the jury against the female defendant (i) because of the decision in FORSYTH (1899) Chester Summer Assizes, and the proposition of law referred to in Archbold's *Criminal Pleading, etc.*, 34th ed., § 2480, which is stated in the headnote, and (ii) because there was no evidence of wilful neglect by the female defendant.

Fenton Atkinson, Q.C., and *C. T. B. Leigh*, for the Crown, relied on SENIOR [1899] 1 Q.B. 283, and section 1 (1) and (2) of the Children and Young Persons Act, 1933.

ELWES J.: These defendants, husband and wife, are jointly charged with the manslaughter of their three-year-old child Veronica, and the case for the prosecution consists of allegations that the dead child sustained serious injury from scalding and died some three days later, and that the doctor, whose surgery was three doors away, was not sent for until the child had died, and that prompt medical attention would, as a matter of strong probability, have saved the child's life.

On these facts the prosecution contend that there is evidence of a misdemeanour under section 1 of the Children and Young Persons Act, 1933. That section reads: "If any person who has attained the age of 16 years and has the custody, charge, or care of any child under that age, wilfully neglects him in a manner likely to cause him unnecessary suffering or injury to his health that person shall be guilty of misdemeanour." And subsection (2) reads: "For the purpose of this section a parent or other person legally liable to maintain a child shall be deemed to have neglected him in a manner likely to cause injury to health if he fails to provide medical aid."

The prosecution relies on the case of SENIOR [1899] 1 Q.B. 283, which is authority for a proposition stated by Wills J. in summing up that case in these words (at p. 285): "If the defendant had done anything that was expressly forbidden by statute, and by so doing had caused or accelerated the child's death, he would be guilty of manslaughter."

At the close of the case for the prosecution a submission was made on behalf of the wife which is based on a paragraph in the current 1959 (34th) edition of *Archbold*. The paragraph is 2480 and is to be found on p. 941, and it reads: "It has been held on the authority of R. *v.* SQUIRE (1799) 1 Russ.Cr., 11th ed., 460, and R. *v.* SAUNDERS (1836) 7 C. & P. 277, that where a husband and wife are living together the legal obligation to maintain is on the husband and the wife cannot be convicted of manslaughter by neglect to provide proper food or medical aid."

R. *v.* FORSYTH is also cited, an unreported case at Chester Summer Assizes in July, 1899. The first of the cases referred to is SQUIRE (*supra*), and that is referred to in an abbreviated report in the 11th edition of Russell on *Crimes* at p. 460 of the first volume. The facts of that case appear to be that a man and his wife were indicted for the murder of a boy who was bound as a parish apprentice. It appears that this apprentice, having been used in a cruel and barbarous manner by both persons, and evidently starved as well, died from debility and for want of proper food and nourishment. Lawrence J. considered the indictment defective against the wife because it was not her duty to provide the apprentice with food and nourishment, she being the servant of the husband, and so he directed the jury to acquit her. That case was tried at the Stafford Lent Assizes in 1799.

SAUNDERS (*supra*) was tried in 1836 before Alderson B., and the headnote reads: "A married woman cannot be convicted of the murder of an illegitimate child by omitting to supply proper food unless it is shown that her husband supplied her with food to give to the child and that she wilfully neglected to give it."

Both these cases are charges of murder and are distinguishable from the present case on a number of grounds which I need not particularise. They are obsolete as a matter of principle so far as I can see, since in those days, of course, the wife was the servant of her husband, and also because, as I have already said, the charge is manslaughter founded upon

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proof of a statutory misdemeanour. I have no hesitation in rejecting the submission for the defence and it appears to me that paragraph 2480 of the current edition of *Archbold* should be reconsidered. The authorities referred to do not support the statement of the law contained in the paragraph which Mr. Oakes, for the defence in this case, has very properly cited.

[His Lordship ruled that there was evidence of wilful neglect fit to be considered by a jury against both defendants and the case proceeded.]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE STREATFEILD AND MR. JUSTICE HINCHCLIFFE

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ROBERT NELSON EMBLETON OAKES

Official Secrets—Doing Act Preparatory to Communicating Official Documents to Another Person — Whether Offence Known to Law Involved — Interpretation of Statute — Official Secrets Act, 1920 (10 & 11 *Geo.* 5, *c.* 75), *s.* 7.

By section 7 of the Official Secrets Act, 1920: "Any person who attempts to commit any offence under the principal Act [the Official Secrets Act, 1911] or this Act, or solicits or incites or endeavours to persuade another person to commit an offence, or aids or abets *and* does any act preparatory to the commission of an offence under the principal Act or this Act, shall be guilty of [an] . . . offence . . ."

In order to give intelligible meaning to this section, the word "and" where italicised must be read as "or."

ATT.-GEN. *v.* BEAUCHAMP [1920] 1 K.B. 650 applied.

A count, therefore, which charged the appellant that he "did an act preparatory to communicating to another person for a purpose prejudicial to the safety of the State documents calculated to be of use to an enemy by entering into an arrangement with one W. whereby the said W. was to secure a purchaser for certain documents used in a prohibited place and in the possession of" the appellant was held to be good in law.

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Appeal against conviction.

The appellant was convicted at Surrey Assizes on November 20, 1958, of offences against the Official Secrets Acts, and was sentenced by Slade J. to concurrent terms of 18 months', 12 months' and 2 years' imprisonment.

The appellant pleaded Guilty to retaining documents contrary to section 2 (*b*) of the Official Secrets Act, 1911, and to communicating a document contrary to section 2 (*a*) of the same Act. The last count of the indictment charged the appellant that on July 4, 1958, in the county of Surrey, he did an act preparatory to communicating to another person, for a purpose prejudicial to the safety or interests of the State, documents calculated to be of use to an enemy by entering into an arrangement with one Warner whereby the said Warner was to secure a purchaser for certain documents used in a prohibited place and in the possession of the appellant. Before the appellant pleaded to that count, defending counsel moved to quash the count on the ground that it disclosed no offence known to the law. Slade J., after hearing arguments, overruled the submission, whereupon the appellant pleaded Guilty. Slade J. gave a certificate under section 3 (*b*) of the Criminal Appeal Act, 1907, on the question whether the count disclosed an offence known to the law.

Gerald Howard, Q.C., and *J. S. Abdela* for the appellant.

The Attorney-General (*Sir Reginald Manningham-Buller*, Q.C.), *Harold Brown*, Q.C., and *E. J. P. Cussen* for the Crown.

The arguments appear fully from the judgment.

THE LORD CHIEF JUSTICE: This appellant was charged at Kingston Assizes on four counts. In regard to the first count, which was for stealing official documents, no evidence was tendered and he was acquitted. To the second and third, which consisted of retaining documents contrary to section 2 of the Official Secrets Act, 1911, and communicating a document contrary to that section, he pleaded Guilty. The fourth

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count was in these terms: "That on the 4th July, 1958, in this county, you did an act preparatory to communicating to another person for a purpose prejudicial to the safety or interests of the State documents calculated to be of use to an enemy by entering into an arrangement with one Warner whereby the said Warner was to secure a purchaser for certain documents used in a prohibited place and in the possession of you, the said Oakes." Before the appellant pleaded to that count, Mr. Howard moved to quash the count on the ground that it disclosed no offence known to the law. The learned judge, Slade J., after hearing arguments, overruled that submission, whereupon the prisoner pleaded Guilty, and it is in regard to that motion to quash the indictment that this appeal is made.

The section in question is section 7 of the Official Secrets Act, 1920, which provides as follows: "Any person who attempts to commit any offence under the principal Act [the Official Secrets Act, 1911] or this Act, or solicits or incites or endeavours to persuade another person to commit an offence, or aids or abets and does any act preparatory to the commission of an offence under the principal Act or this Act, shall be guilty of a felony or a misdemeanour or a summary offence according as the offence in question is a felony, a misdemeanour or a summary offence, and on conviction shall be liable to the same punishment, and to be proceeded against in the same manner, as if he had committed the offence."

It is pointed out, as it was pointed out to the learned judge, that a number of matters are there set out which will constitute an offence. They are all separated by the disjunctive "or" until one gets to the word "abets," when instead of the sentence going on "or does any act preparatory to the commission of an offence," the words are "and does any act." Accordingly, it is said that, on its literal meaning, there is not constituted under that section an offence of doing an act preparatory to the commission of an offence alone, and that being what the appellant was charged with, there is no offence alleged under the section.

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The argument here is in a very short compass. Mr. Howard points out what is undoubtedly true, that the concern of the courts is to ascertain the intention of Parliament. That intention certainly, in the first instance at any rate, is to be found from the actual words used, and he quotes in support of that some very strong observations of Lord Simonds L.C. in MAGOR AND ST. MELLONS R. D. C. *v.* NEWPORT CORPORATION [1952] A.C. 189, at p. 191. Mr. Howard goes further; he says that when you are looking at a penal statute, still more so when you are looking at a penal statute constituting a new offence, it is imperative on the court to look alone at the words used, and in that connection he refers to the judgment of Pollock C.B. in ATT.-GEN. *v.* SILLEM (1863) 33 L.J.Ex. 92, at p. 110. There, Pollock C.B. said: "We have had in this country no court of criminal equity since the Star Chamber was abolished, as Lord Campbell called it, in a case tried before him. . . . Mr. Justice Blackstone well lays down the rule (1 Comm. 92), 'The freedom of our constitution will not permit that in criminal cases a power should be lodged in any judge to construe the law otherwise than according to the letter.'" A little further on he said: "If I were asked whether there be any difference left between a criminal statute and any other statute not creating an offence, I should say that in a criminal statute you must be quite sure that the offence charged is within the letter of the law." He also refers to COE *v.* LAWRENCE (1852) 22 L.J.Q.B. 140. From there Mr. Howard goes on to contend that, if you do read the sentence in section 7 literally, it in fact makes a grammatical sentence—you can give to each word a meaning—and accordingly he says that, even if the result may be absurd, there is no ground for making any alteration in the language or reading any words into it. The court feels that it is at that point that it is constrained to depart from Mr. Howard's argument. It seems to this court that where the literal reading of a statute and a penal statute produces an intelligible result, clearly there is no ground for reading in words or changing words according to what may be the supposed intention of Parliament. But

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here we venture to think that the result is unintelligible. Lord Coleridge, in ATT.-GEN. *v.* BEAUCHAMP, put it quite shortly in these words ([1920] 1 K.B. 650, at p. 655): "Unquestionably, when one is considering a penal statute, the first thing is to construe it according to the ordinary rules of grammar, and if a construction which satisfies those rules makes the enactment intelligible, and especially if it carries out the obvious intention of the legislature as gathered from a general perusal of the whole statute, that grammatical construction ought not to be departed from."

We think that the literal construction here produces an unintelligible result, and for many reasons. In the first place, there is an obvious difficulty with regard to what is qualified by the words "and does any act preparatory to the commission of an offence." Do they qualify all the alternatives that have gone before? Do they qualify only the words that have followed the last comma, namely, "or aids and abets," or do they qualify only the last word "abets"? If they qualify all that has gone before, clearly in regard to an attempt they make nonsense, because an act preparatory to the offence is something more remote than an act which constitutes an attempt, and accordingly they are meaningless in connection with attempts, and indeed it is difficult to give them a meaning with regard to "solicits or incites or endeavours to persuade." If, on the other hand, they only qualify the words "and aids or abets" or the word "abets" alone, then immediately one asks: What is the sense of them applying to those words and not to the words "solicits or incites or endeavours to persuade"? Whichever way the section is read, an absurd result is obtained. Secondly, it is to be observed that, but for these words, an aider or abettor by reason of the Accessories and Abettors Act, 1861, would have committed an offence, and accordingly, if the argument is right and the literal interpretation is given, it results in this, that in a matter which involves the security of the State the offence of aiding and abetting is watered down, if I may use that expression, limited to such aiding and abetting in which an

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act preparatory to the commission of an offence has taken place. Thirdly, it is to be observed that the conception of doing an act preparatory to the commission of an offence had been considered by the courts before the passing of this Act. As long ago as 1855, in EAGLETON, 6 Cox 559, Parke B. was considering the sort of acts which would constitute an attempt and drawing a distinction between those acts and acts which were more remote and which were merely acts of preparation. Again, in LINNEKER [1906] 2 K.B. 99, the court were drawing a distinction between acts of preparation and acts which would constitute attempts. Also in ROBINSON, (1915) 11 Cr.App.R. 124; [1915] 2 K.B. 342, the same distinction was drawn. Then before ROBINSON (*supra*), in the Defence Regulations made in the First World War it was provided by an amendment in regulation 48: "Any person who attempts to commit, or procures, aids or abets, or does any act preparatory to the commission of any act prohibited by these regulations, or harbours any person whom he knows, or has reasonable grounds for supposing, to have acted in contravention of these regulations, shall be guilty of an offence against these regulations." Passing for a moment to the period after the passing of the Act, it is to be observed that by regulation 28 of the Emergency Regulations, 1921, it was again provided that "Any person who does any act preparatory to the commission of any act prohibited by these regulations shall be guilty of an offence." The same words appear in the Defence (General) Regulations, 1939, in force during the last war. Everywhere, be it observed, when this sort of situation is being discussed and where enactments are made in regard to it, the enactment is considering the doer of an act preparatory to the commission by him of an offence, and it seems to the court that that is the natural meaning of those words. If you try to read those words in that sense as a qualification of aiding and abetting, the result becomes absurd, because the essence of aiding and abetting is the aiding and abetting of someone else to commit an offence, and to say that it is a

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qualification of that that a man should do an act preparatory to the commission of an offence by himself is pure nonsense.

Accordingly, for all those reasons it seems to this court that, read literally, no intelligible meaning can be given to this section, and accordingly this court agrees with the learned judge. The learned judge thought that the natural way of getting over the difficulty was to read into the Act after the word " and " and before the word " does " the opening words of the section, " Any person who," so that it would read " or aids or abets and any person who does any act preparatory to the commission of an offence under the principal Act or this Act." The court, on the whole, prefers to read the word " or " for " and," because, if the words " any person who " are inserted, it leaves the words " aids or abets " in the air, whereas if " and " is changed to " or " it will read in this way: " or aids or abets or does any act preparatory to "—and then I insert a comma—" the commission of an offence." Indeed, read in that way, the section happens very closely to correspond with the only two enactments near the time, namely, the 1914 Regulations and the 1921 Regulations.

Mr. Howard has quite rightly pointed out that, although the court has on occasions read " and " for " or " and " or " for " and," it has with one exception been in order to produce a result more favourable to the subject. The court feels, however, that on principle there is no reason, if compelled to that end, why the words should not be changed even though the result is less favourable to the subject, and indeed that was done in the case to which I have already referred, ATT.-GEN. *v.* BEAUCHAMP (*supra*). In that case, at p. 657, Rowlatt J., having referred to the manifest absurdity which would arise if a literal construction was given, went on in this way: " It is not really a question of adding anything to the section, for it is quite clear what the intention was, and the omission of certain words that you would expect to find there is nothing more than a faultiness of expression." It seems to the court that it is quite clear in this case what the intention was, and that there has been merely a faultiness of

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expression. Again, McCardie J., who agreed with Rowlatt J., said at the end of his judgment (at p. 658): "That seems to be the reasonably plain meaning of the section which we have to consider, while it is in agreement with the earlier legislation on the subject." Everything that was said by those two judges seems to this court to apply fully in the circumstances of this case. Accordingly, the court will read "or" for "and," and this appeal is dismissed.

Appeal dismissed.

[COURTS-MARTIAL APPEAL COURT]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE STREATFEILD AND MR. JUSTICE HINCHCLIFFE

THOMAS JOSEPH SMITH

1959
Mar. 24, 25

Evidence—Confession—Admissibility—Earlier and Later Confessions—First Confession Made as Result of Threat—Whether Original Threat Dissipated when Later Confessions Made.

Homicide — Wound — Death after Intervening Incidents — Test Whether Original Wound Still an Operating and Substantial Cause.

Where a statement has been induced by a threat or promise and thereby has been rendered inadmissible, and a second statement is made, if the threat or promise under which the first statement was made still persists when the second statement is made, then the second statement also is inadmissible. It is only if the time limit between the two statements, the circumstances existing at the time of the second statement and the caution then administered are such that it can be said that the original threat or inducement has been dissipated that the second statement can be admissible as a voluntary statement.

MEYNELL (1834) 2 Lew.C.C. 122, SHERRINGTON (1834) 2 Lew.C.C. 134 and DOHERTY (No. 1) (1874) 13 Cox 23 followed.

Three soldiers were stabbed at a barracks with a bayonet

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about 10 p.m. Very soon afterwards a number of soldiers, including the appellant, were paraded by the regimental sergeant-major, who said: "I am going to get to the bottom of this fighting and whoever did it must step forward." Nobody then stepped forward and they were all questioned by the regimental sergeant-major with regard to their movements at the material time. The appellant stated that he was in bed. The regimental sergeant-major then said: "I am not leaving; I am staying here till you give me an answer about this fight." The appellant then stepped forward and said that he had done the stabbing with a bayonet, and was taken into custody. At about 7.30 on the following morning a sergeant from the Special Investigation Branch interviewed the appellant, and after administering the usual caution referred to what had happened the night before and the appellant's admission at that time. The appellant replied: "Yes, I am not denying it. I stabbed three of them all right," and then made a written statement under caution to the same effect. On the trial of the appellant for the murder of one of the three stabbed men, who subsequently died,

Held, that the appellant's first confession to the regimental sergeant-major was inadmissible as having been induced by a threat; but that his subsequent oral and written confessions to the sergeant of the Special Investigation Branch were admissible, as by that time the effect of the original threat had been dissipated.

Where a person has received a wound and dies after an interval of time and the occurrence of intervening incidents, if at the time of death the original wound is still an operating and substantial cause, then the wound can properly be said to be the cause of death, albeit that some other cause of death is also operating, and the person who inflicted the wound will be liable for homicide. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that death does not result from the wound.

JORDAN (1956) 40 Cr.App.R. 152 explained.

Appeal against conviction.

The appellant was convicted by a general court-martial at Verden, Germany, on July 2, 1958, of the murder of Pte. William Creed and was sentenced to imprisonment for life.

The appellant was a private soldier in the King's Regiment. On April 13, 1958, a company of that regiment was sharing a barracks with a company of the Gloucestershire Regiment. On that night a fight developed in which three men of the

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Gloucestershire Regiment were stabbed and one of them, Pte. Creed, subsequently died. Immediately after the fight the regimental sergeant-major of D Company of the King's Regiment paraded a number of soldiers, including the appellant, and said: "I am going to get to the bottom of this fighting and whoever did it must step forward." No one then stepped forward and the regimental sergeant-major questioned each man about his movements at the material time. The appellant said that he was in bed. The regimental sergeant-major then said: "I am not leaving; I am staying here until you give me an answer about this fight." The appellant then stepped forward and said that he had done the stabbing with a bayonet. He was then taken into custody. About 7.30 on the following morning he was interviewed by a sergeant of the Special Investigation Branch who, after administering the usual caution, referred to what had happened the night before and the appellant's admission at that time. The appellant replied: "Yes, I am not denying it. I stabbed three of them all right," and then made a written statement under caution to the same effect.

The deceased man had received two bayonet wounds, one in the arm and one in the back, the latter of which, unknown to anybody, had pierced the lung and caused haemorrhage. A fellow-member of his company, who was trying to carry him to the medical reception station, twice tripped and let the deceased man fall on the ground. When he ultimately was brought to the reception station, a transfusion of saline solution was attempted and failed. When his breathing seemed impaired he was given oxygen and artificial respiration was applied. He died after he had been in the station about an hour and about two hours after the original stabbing. There were no facilities whatsoever for blood transfusion. A medical witness who gave evidence for the defence said that had those facilities been available and blood transfusion been administered, the chances of the recovery of the deceased man would have been 75 per cent.

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Roderic Bowen, Q.C. (*H. K. Woolf* with him) for the appellant. None of the alleged confessions by the appellant was admissible in evidence. The original statement on the night of the stabbing to the regimental sergeant-major was clearly inadmissible as having been procured by a threat, and the taint of that threat still persisted and affected the later statements, oral and written, made when the appellant was interviewed by the sergeant of the Special Investigation Branch. This interview was clearly bound up with the events of the previous evening, inasmuch as at the outset reference was made by the sergeant to what had taken place the night before and to the appellant's former admission. There is clear authority for the proposition that a threat or inducement which renders a confession inadmissible may also invalidate a later confession, where no fresh threat or inducement has been made. [He referred to MEYNELL (1834) 2 Lew.C.C. 122; SHERRINGTON (1834) 2 Lew.C.C. 124; DOHERTY (No. 1) (1874) 13 Cox 23; and RUE (1874) 13 Cox 209.]

Further, the summing-up of the Judge-Advocate as to causation was inadequate. A particularly careful summing-up was required on this point, and the jury should have been told that they must be satisfied that the death of the deceased man was the natural and sole consequence of the wound and flowed directly from it. If there was any other cause, whether resulting from negligence or not, or if the chance of the deceased man's recovery was diminished by improper medical treatment, as the evidence in this case strongly indicated, then death did not flow from the wound. The recent decision of this court in JORDAN (1956) 40 Cr.App.R. 152 is directly in point. The headnote states: "*Semble*, that death resulting from any normal treatment employed to deal with a felonious injury may be regarded as caused by the felonious injury, but that the same principle does not apply where the treatment employed is abnormal." This was the view clearly expressed by Hallett J. in delivering the judgment of the court.

E. Garth Moore for the Crown (who was called on on this point only). Even assuming that the original confession was

inadmissible as having been induced by a threat, the position was quite different when the later oral and written confessions were made. The circumstances had entirely changed, an appreciable interval of time had elapsed, and the effect of the threat had disappeared. In those circumstances, on the authorities, the later confessions were admissible.

THE LORD CHIEF JUSTICE: The appellant in this case was convicted by a General Court-Martial in Germany of murder and was sentenced to imprisonment for life. The matter arose in this way: the appellant was a private soldier in the King's Regiment. At the material time a company of the King's Regiment were sharing barracks with a company of the Gloucestershire Regiment, and on the night of April 13, 1958, a fight developed. As a result of that fight three members of the Gloucesters were stabbed with a bayonet and one of them, Private Creed, subsequently died. It was for his murder that the appellant was convicted.

In this court a number of points have been taken, and quite properly taken, by Mr. Bowen on his behalf, but there are, in the view of the court, only two which merit consideration. The first one is the question whether two alleged confessions given by the appellant were wrongly admitted in evidence. It is a vital point, because I think it would be conceded that in the absence of the evidence of those confessions there would have been at the end of the case for the prosecution no evidence against the appellant at all.

The confessions arose in this way: The fight took place just before 10 o'clock at night, as I understand it, and immediately after the fight the regimental sergeant-major of D Company of the King's Regiment, having heard that there had been a fight in which, as far as he knew, two men had been stabbed—he did not know of the third and indeed Private Creed had not then died—put the company on parade in one of the barrack rooms, and used words to the effect: "I am going to get to the bottom of this fighting and whoever did it must step forward." He indicated quite plainly

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that his intention was to keep them there until he could get to the bottom of the matter. Nobody did step forward and he then addressed each man personally, asking them where they were and, so far as this appellant is concerned, he got the answer " I was in bed." The regimental sergeant-major still was not satisfied and then said words to the effect: " I am not leaving, I am staying here until you give me an answer about this fight," and it was at that point that the appellant stepped forward and said " I did the stabbing." He was then asked what weapon he had used, and he replied: " A bayonet which was by the bed in the barrack room."

The court is quite clear that, while there was nothing improper in the action taken by the regimental sergeant-major, the evidence of what took place was clearly inadmissible at the appellant's trial. What the sergeant-major did might well have been a very useful course of action in order to enable further inquiries to be made, but the court is quite satisfied that if the only evidence against the appellant was a confession obtained in those circumstances, it would be quite inadmissible at his trial. It has always been a fundamental principle of the courts, and something quite apart from the Judges' Rules of Practice, that a prisoner's confession outside the court is only admissible if it is voluntary. In deciding whether an admission is voluntary, the court has been at pains to hold that even the most gentle, if I may put it in that way, threats or slight inducements will taint a confession. To say to a man in the presence of the rest of his company, or rather to say to all those on parade " You are staying here and are not going to bed until one of you owns up " is, in the view of this court, clearly a threat. It might also, I suppose, be looked upon as an inducement in that the converse is true, " If one of you will come forward and own up, the rest of you can go to bed "; but, whichever way one looks at it, the court is clearly of opinion here that while the action was perfectly proper and a useful start, no doubt, to inquiries, evidence in regard thereto was clearly inadmissible.

The matter, however, does not rest there, because at about

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7.30 the next morning Sergeant Ellis, from the Special Investigation Branch, came down to make inquiries, and he, when he first saw the appellant, gave him the usual caution. He, however, went on to refer then to what had happened the night before. Apparently after administering the caution he said: "There was a disturbance last night in a barrack room in Polish Barracks. I understand that after the disturbance you admitted to your R.S.M. that you had been involved and that you stabbed three men of the Gloucestershire Regiment." Apparently Sergeant Ellis by then had been told that three men were involved. The appellant replied: "Yes, I am not denying it. I stabbed three of them all right." He was then asked if he wished to make a statement. He said "Yes." A written caution was then made, which the appellant signed, and there followed a statement which I need not read, but which admitted that he had stabbed about three of them altogether with a bayonet which he found on the floor of the room.

It is urged by Mr. Bowen, on his behalf, that the original taint in the confession given to the sergeant-major really persisted in these later confessions, both oral and in writing, and in particular he points to the fact, as I have said, that Sergeant Ellis at the outset referred to what had taken place or what was said to have taken place the evening before. Mr. Bowen also referred us to a number of cases. It is unnecessary to refer to them in detail. He starts with MEYNELL (1834) 2 Lew.C.C. 122 where, in regard to a second confession, Taunton J. said (at p. 123): "I am clearly of opinion that it is not receivable; it being impossible to say that it was not induced by the promise which the constable made to her in the morning." In other words, he was saying that the second statement was inadmissible in that a promise made when the first statement was given was still in operation when the second statement was given. To the same effect was the opinion of Patteson J. in SHERRINGTON (1834) 2 Lew.C.C. 124, where he said: "There ought to be strong evidence to show that the impression under which the first confession was made,

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was afterwards removed, before the second confession can be received. I am of opinion, in this case, that the prisoner must be considered to have made the second confession under the same influence as he made the first; the interval of time being too short to allow of the supposition that it was the result of reflection and voluntary determination." I should observe that in neither of those cases was a caution administered before the second statement was obtained.

He also refers to an Irish case of DOHERTY (No. 1) (1874) 13 Cox C.C. 23, where Whiteside C.J., in ruling on the admissibility of the second statement, said (at p. 24): "The judges have held that it must be shown that the prisoner thoroughly understood that he could expect no gain from a confession. The subsequent caution must be shown to have had the effect of removing all such expectation from the prisoner's mind." Again, in RUE (1874) 13 Cox 209, Denman J. said this (at p. 210): "There are cases which hold that a confession once rejected on the ground that it was made under an inducement does not become admissible merely from the fact that it was again made to some other person who has not held out an inducement, the inducement being deemed to be a continuing one. But I am not at this moment aware of any case in which it has been held that, where the person who held out the inducement is absent, then a confession made to a third party is not admissible, no fresh inducement having been held out. The general principle is clear, that if it is made out to the satisfaction of the judge that the statement was not made voluntarily, it is not admissible. It is not merely a question as to whom the confession is made or when it is made; but it is a matter in which you have to get at the mind of the prisoner, and see whether or not it is probable that the confession was made voluntarily, in the proper sense of the word." Having consulted the Lord Chief Baron, Denman J. held on the facts of that case that the second statement was so connected with the original inducement as to be inadmissible.

The court thinks that the principle to be deduced from the cases is really this: that if the threat or promise under which

the first statement was made still persists when the second statement is made, then it is inadmissible. Only if the time limit between the two statements, the circumstances existing at the time and the caution are such that it can be said that the original threat or inducement has been dissipated can the second statement be admitted as a voluntary statement.

In the present case the Judge-Advocate never had to consider or rule on this second statement. Having admitted the first statement, there was no question on that basis but that the second statement must be also admissible. Accordingly, he never had to rule on the question of admissibility. He never had to exercise any discretion in the matter, and there was no occasion for his leaving it to the court on the value or weight to be attached to the confession. This court, however, is of the clear opinion that the second statement was admissible. No doubt, the opening reference to what it was said he had said to the regimental sergeant-major put the appellant in a difficulty. No doubt it was introduced by Sergeant Ellis in the hope that thereby he might get a continued confession; but it is quite clear that the effect of any original inducement or threat under which the first statement was made had been dissipated. Quite apart from the fact that the caution was given and given twice, some nine hours had elapsed and the whole circumstances had changed. The parade had ended. The rest of the company had gone to bed. The effect of the threat or the inducement was spent. On those grounds this court has come to the conclusion that the oral and written statements made to Sergeant Ellis were clearly admissible.

The second ground concerns a question of causation. The deceased man in fact received two bayonet wounds, one in the arm and one in the back. The one in the back, unknown to anybody, had pierced the lung and caused haemorrhage. There followed a series of unfortunate occurrences. A fellow member of his company tried to carry him to the medical reception station. On the way he tripped over a wire and dropped the deceased man. He picked him up again, went a

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little further, and fell apparently a second time causing the deceased man to be dropped on to the ground. Thereafter he did not try a third time, but went for help and ultimately the deceased man was brought into the reception station. There, the medical officer, Captain Millward, and his orderly were trying to cope with a number of other cases, two serious stabbings and some minor injuries, and it is clear that they did not appreciate the seriousness of the deceased man's condition or exactly what had happened. A transfusion of saline solution was attempted and failed. When his breathing seemed impaired, he was given oxygen and artificial respiration was applied, and in fact he died after he had been in the station about an hour, which was about two hours after the original stabbing. It is now known that, having regard to the injuries which the man had in fact suffered, his lung being pierced, the treatment that he was given was thoroughly bad and might well have affected his chances of recovery. There was evidence that there is a tendency for a wound of this sort to heal and for the haemorrhage to stop. No doubt his being dropped on the ground and having artificial respiration applied would halt or at any rate impede the chances of healing. Further, there were no facilities whatsoever for blood transfusion, which would have been the best possible treatment. There was evidence that, if he had received immediate and different treatment, he might not have died. Indeed, had facilities for blood transfusion been available and been administered, Dr. Camps, who gave evidence for the defence, said that his chances of recovery were as high as 75 per cent.

In these circumstances Mr. Bowen urges that not only was a careful summing-up required, but that a correct direction to the court would have been that they must be satisfied that the death of Private Creed was a natural consequence and the sole consequence of the wound sustained by him and flowed directly from it. If there was, says Mr. Bowen, any other cause whether resulting from neigligence or not, or if, as he contends here, something happened which impeded the chance of the deceased recovering, then the death did not result from

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the wound. The court is quite unable to accept that contention. It seems to the court that if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound. Putting it in another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound.

There are a number of cases in the law of contract and tort on these matters of causation, and it is always difficult to find a form of words when directing a jury or, as here, a court, which will convey in simple language the principle of causation. It seems to the court enough for this purpose to refer to one passage in the judgment of Lord Wright in THE OROPESA, reported in [1943] P. 32, where he says (at p. 39): "To break the chain of causation it must be shown that there is something which I will call ultroneous, something unwarrantable, a new cause which disturbs the sequence of events, something which can be described as either unreasonable or extraneous or extrinsic." To much the same effect was a judgment on the question of causation given by Denning J., as he then was, in MINISTER OF PENSIONS *v.* CHENNEL in [1947] K.B. 250.

Mr. Bowen placed great reliance on a case decided in this court, JORDAN (1956) 40 Cr.App.R. 152, and in particular on a passage in the headnote which says: "*Semble*, that death resulting from any normal treatment employed to deal with a felonious injury may be regarded as caused by the felonious injury, but that the same principle does not apply where the treatment employed is abnormal." Reading those words into the present case, Mr. Bowen says that the treatment that this unfortunate man received from the moment that he was struck to the time of his death was abnormal. The court is satisfied that JORDAN (*supra*) was a very particular case depending

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upon its exact facts. It incidentally arose in this court on the grant of an application to call further evidence, and, leave having been obtained, two well-known medical experts gave evidence that in their opinion death had not been caused by the stabbing, but by the introduction of terramycin after the deceased had shown that he was intolerant to it and by the intravenous introduction of abnormal quantities of liquid. It also appears that at the time when that was done the stab wound which had penetrated the intestine in two places had mainly healed. In those circumstances the court felt bound to quash the conviction, because they could not say that a reasonable jury, properly directed, would not have been able on that to say that there had been a break in the chain of causation; the court could only uphold the conviction in that case if they were satisfied that no reasonable jury could have come to that conclusion.

In the present case it is true that the Judge-Advocate did not, in his summing-up, go into the refinements of causation. Indeed, in the opinion of this court, he was probably wise to refrain from doing so. He did leave the broad question to the court whether they were satisfied that the wound had caused the death in the sense that the death flowed from the wound, albeit that the treatment he received was in the light of after-knowledge a bad thing. In the opinion of this court, that was on the facts of the case a perfectly adequate summing-up on causation; I say " on the facts of the case," because in the opinion of the court they can only lead to one conclusion. A man is stabbed in the back, his lung is pierced and haemorrhage results; two hours later he dies of haemorrhage from that wound; in the interval there is no time for a careful examination and the treatment given turns out in the light of subsequent knowledge to have been inappropriate and, indeed, harmful. In those circumstances no reasonable jury or court could, properly directed, in our view possibly come to any other conclusion than that the death resulted from the original wound. Accordingly, the court dismisses this appeal.

Appeal dismissed.

[LIVERPOOL CROWN COURT CASE]

BEFORE

THE RECORDER, JUDGE LASKI

R. *v.* CAMPBELL AND OTHERS

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Liverpool Crown Court — Jurisdiction — Charge of Robbery with Aggravation — Chief Prosecution Witness Abroad — Successive Applications by Prosecution for Case to be Respited—Habeas Corpus Act, 1679 (31 *Car.* 2, *c.* 2), *s.* 6 — *Criminal Justice Administration Act*, 1956 (4 *& 5 Eliz.* 2, *c.* 34), *s.* 1.

On December 11, 1958, C. and two other persons were committed for trial on a charge of robbery with aggravation to the Crown Court at Liverpool, which sits eleven times a year. In January 1959 the two other persons pleaded Guilty and were sentenced, but C. pleaded Not Guilty. On this occasion, and again in February 1959, counsel for the prosecution applied for the trial to be respited to the next sessions on the ground that the complainant was out of the country, and these applications were granted. It appeared that the complainant would not return till July 1959, and in March 1959 counsel for the prosecution applied for a ruling whether application should continue to be made each sessions for the trial to be respited to July or whether an application could then be made for such respite.

Held, (i) that section 6 of the Habeas Corpus Act, 1679, did not apply because the application was here made by the prosecution and not the defence and in any event the defendant C. had not complied with the conditions precedent with regard to procedure there laid down; (ii) that the court had a discretionary power to give directions with regard to the future of the case against C. and, in the exercise of that discretion, would order that the indictment lie on the file and be not further proceeded with without leave of the court.

ANONYMOUS CASE (1680) *Ventris Reports*, p. 36, applied.

BOWEN (1840) C. & P. 509 and OLIVER (1958) 42 Cr.App.R. 27 considered.

Application to the Recorder of Liverpool (Judge Laski) for direction with regard to trial.

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The facts are summarised in the headnote and appear fully in the judgment.

George Bean for the prosecution.
J. M. Dovener for the defence.

THE RECORDER, JUDGE LASKI: On December 11, 1958, Campbell and two others, man and wife, were committed to this court by the Liverpool magistrates on a charge of robbery with aggravation at Liverpool of one John Ball on December 7, 1958, contrary to section 23 (1) (*a*) of the Larceny Act, 1916. The married pair pleaded Guilty and have been sentenced by me. It is the position of Campbell with which I have to deal.

Campbell came before me at the January 1959 session of this court. Application was made to respite the case to the February session as the complainant, a seaman, was out of the country. I granted this application and gave bail to Campbell. At the February sitting of this court a similar application was made for the same reason and I respited the case to this session, Campbell remaining on bail. An application has been made to me further to respite this case and I have been informed that the complainant will not be in this country until July.

The Habeas Corpus Act, 1679, was cited to me as having immediate relevance to the instant case and I was referred to paragraphs 241–243 of *Archbold*, 34th ed., as providing an adequate simplified summary of the meaning of section 6 of that Act. Under the Assizes Relief Act, 1889, if a person committed for trial at sessions is not tried at the next sessions, the next Court of Assize may *on his application* try or discharge him or release him on bail, unless the delay is due to special reasons, such as the impossibility of producing the witnesses for the Crown (s. 3 (1), (3)). If the next court of quarter sessions has not tried him before the next subsequent assizes, the judge of assize must try or discharge him (s. 3 (2)). The offence in respect of which Campbell is indicted

is not triable at quarter sessions. (See Quarter Sessions Act, 1842, s. 1.)

The court in which I sit is a Janus-like hybrid in that it has functions both for the purpose of exercising such jurisdiction as is commonly conferred on courts of assize by the commissions of oyer and terminer and gaol delivery (s. 1 (1) of the Criminal Justice Administration Act, 1956), and in that capacity it is known as "The Crown Court at Liverpool" (*ibid.*, subs. (*a*)), and it also, under section 3 of the same Act, has (I use the marginal note) additional jurisdiction as a court of quarter sessions for Liverpool. It is clear that I must deal with this matter in the context of section 1 of the Act constituting this court.

The Central Criminal Court was constituted in 1834 by an Act of that year (4 & 5 Will. 4, c. 36). It took the place of the former sessions at the Old Bailey which had been held from very early times under special commissions of gaol delivery for Newgate and oyer and terminer for the City of London and the County of Middlesex. The court now sits under a general commission of gaol delivery and oyer and terminer and has power to proceed thereunder until the commission is renewed (s. 2). The court sits eleven times each year. In these respects the Central Criminal Court is in *pari materia* with this court. The Central Criminal Court is part of the High Court of Justice (Supreme Court of Judicature (Consolidation) Act, 1925, ss. 18 and 70, and see note (*g*), Halsbury, *Laws of England*, 3rd ed., vol. 9, at p. 407). It is a court of assize also (see Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (4)). In my view the definition of assizes in that subsection would include this court.

I now turn to a consideration of section 6 of the Act of 1679. I do not find myself, after reading with care and frequency that section, able to feel that it is as easily construed as the simplicity of the explanation in *Archbold* (*supra*) would suggest. It is true that Sir William Holdsworth, at page 118 of volume 9 of his *History of English Law* (3rd ed.), also gives a very simple summary of section 6, but fails, in my respectful

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opinion, to note the procedural conditions precedent, to which point I later herein refer, which in fact finds an echo in the Assizes Relief Act cited above.

It must be remembered that this is an old Act conditioned in its terms by the law and procedure of its day. In *Ventris Reports* at page 346—a black letter folio volume—I have found an anonymous case heard in Hill. Anno 31 & 32 Car. II in B.Rs., that is to say in Banc in the King's Bench in Hilary Term of 1680 within a year after the passing of the Act.

The *Report* runs as follows: " A person who was committed to the Tower for conspiring the death of the King was brought up by Habeas Corpus and prayed to have bail taken, unless an indictment were found against her this term, according to the new Act of 31 Car. II for Habeas Corpus's. The Court said that they which would have the benefit of that Act, must pray it before the first week of the term expires; but in regard it appeared, that she had prayed it before by her counsel, and her habeas corpus was taken out in time, the court said, the benefit of the Act should be saved to her, for the prayer is not necessary to be made in person, but Mr. C. G. was refused the advantage, he having omitted to make the prayer during the first week, either in person or by counsel."

In volume 8 of *The Statutes at Large*, edited by Danby Pickering and published in Cambridge in 1763, the Act is printed at pp. 432 *et seq.* The present notation, consecrated by the official Statutes of the Realm, of the relevant section is 6, in Pickering it is 7. It is clear that the anonymous *Ventris* case was regarded as good law as it is therein marginally cited. I do not regard BOWEN (1840) 9 C. & P. 509 as of great value to me, but it does, by reason of the careful argument of Mr. Greaves of counsel, show that at that date also it was recognised that the benefit of the Act of 1679 depended upon the observance of certain procedural conditions precedent.

It may be that in terms of today it is difficult, if not impossible, to comply with the requirements of the statute. That may be an argument of validity and force for amending or

reconstructing the law of habeas corpus, but today I must construe the Act of 1679 as it is. In the first place, this application is made to me by the Crown and not by the prisoner. In the second place, I hold that the procedural conditions precedent of the Act of 1679 have not been complied with. In these circumstances I hold that no case exists for the application of the Act of 1679.

The preamble to the Act of 1679 makes clear the abuses aimed at—abuses which do not obtain in modern times. It is perhaps not improper to add that the decision of Williams J. in BOWEN (*supra*) seems to accord with the common sense of the matter, albeit no reasons are given and it is not easy to follow the phrases " human law " and " humanly interpreted."

I have looked at OLIVER (1958) 42 Cr.App.R. 27, which was cited to me. That case does not appear to me to assist in this matter. I may add that despite my researches I can find no evidence of a matter arising in *pari materia* with this matter before me from which in terms of its treatment *aliunde* I could gain guidance.

I note with interest that in the learned article on Habeas Corpus which appears at pp. 468 *et seq.* of vol. 6 of the 2nd (1907) edition of the *Encyclopaedia of the Laws of England*, edited by Renton and Robertson, it is stated at page 471 " at the present day, indeed, the writ of habeas corpus is almost invariably issued by virtue of the common-law jurisdiction, and not under the statute."

Campbell is not, however, without remedy. I conceive myself within the law to have a discretionary power to give a direction on the future of this matter. In my opinion the justice of the case will be met if I order that the indictment lie on the file and be not further proceeded with without an order of the court.

Solicitors: Town Clerk, Liverpool, for the Crown; K. Maxwell Brown, Liverpool, for the defence.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DEVLIN, MR. JUSTICE DONOVAN, MR. JUSTICE McNAIR AND MR. JUSTICE HINCHCLIFFE

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ALBERT SAMUEL JOHN COOK

Character of Prisoner—Cross-Examination on Previous Convictions —Imputation on Character of Crown Witness—Suggestion to Police Officer that Statement had been Obtained by Threat— Statute to be Given Natural Meaning—Discretion of Judge to Allow or Not Allow Cross-Examination—Failure to Exercise— No Warning Given to Prisoner—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), s. 1, *proviso* (*f*) (ii).

By section 1 (*f*) of the Criminal Evidence Act, 1898: "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless . . . (ii) . . . the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution. . . ."

Since it is now clearly established that the trial judge has a discretion whether or not to allow a prisoner to be cross-examined on previous convictions, the words of the above proviso should be given their natural and ordinary meaning. It may be that in this respect cases of rape should be regarded as *sui generis*.

HUDSON, 7 Cr.App.R. 256; [1912] 2 K.B. 464; JENKINS (1945) 31 Cr.App.R. 1; and TURNER, 30 Cr.App.R. 9; [1944] K.B. 463 followed.

The appellant, who conducted his own defence, in the course of his cross-examination of a police officer suggested that a statement had been obtained from him by the officer by means of a threat that, if he did not speak, his wife would be charged. This allegation, which was denied by the officer, was repeated by the appellant in the course of his own cross-examination. Counsel for the prosecution then indicated that he wished to put "certain further questions" to the appellant. The judge said that, while counsel was strictly entitled to do so, he

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himself would have thought it would not be necessary. Counsel then put to the appellant, and the appellant admitted, a number of previous convictions.

Held, that there had been an imputation on the character of the police officer within the meaning of the proviso, and that the matter, therefore, became one for the discretion of the judge; but that the judge had not exercised his discretion at all, because he thought that counsel was entitled to put the questions as of right. Further, the appellant had not been warned either by counsel or by the judge that he was going too far, as was the invariable practice in such cases and as was particularly essential in the case of an unrepresented prisoner. The court must, therefore, hold that the cross-examination on previous convictions was in the circumstances inadmissible, but, being of opinion that no substantial miscarriage of justice had occurred by reason of the irregularity, they would apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, and affirm the conviction.

Appeal against conviction.

The appellant was convicted at Somerset Quarter Sessions on September 26, 1958, of obtaining property by false pretences and of receiving cheque forms, knowing them to have been stolen, and was sentenced by the Chairman (His Honour Judge Armstrong) to concurrent terms of four years' and three years' imprisonment.

The following statement of facts is taken from the judgment: On July 9, 1958, the premises of Ackland & Pratten, Ltd. were broken into and among the property missing were five cheque forms. On July 25 a Mr. Long, who lives at Nailsea near Bristol, advertised a Humber Hawk motor-car for sale. On July 28 he was rung up by a woman, who said that she was Mrs. Pratten and who arranged to buy the car. The appellant's wife was joined with him in the indictment and it appears that the case for the prosecution against her was that she falsely pretended to be Mrs. Pratten. Separate trials were ordered. Later on July 28 the appellant telephoned Mr. Long to say that he was bringing round a cheque from Mrs. Pratten and would collect the car. The appellant came and represented himself to be an employee of Ackland & Pratten, a

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concern well known to Mr. Long. Mr. Long let him take away the car in exchange for a cheque for £430 signed G. E. Pratten. The cheque was on one of the stolen forms and the signature on it was fictitious.

The witnesses for the prosecution included Detective Constable Thomas, who gave evidence that on August 3, 1958, when the appellant was charged, he said that he made out the cheque himself and that he admitted that he had got the car on a dud cheque. Later the appellant made a statement in writing in which he said that he found the cheque book in the road dumped down by the side of the wall. The appellant conducted his case in person; and in the course of his cross-examination of the police officer he suggested that the statement had been obtained from him by means of a threat that if he did not speak his wife would be charged; this suggestion was denied. The appellant later gave evidence on his own behalf and in answer to questions in cross-examination about his statement to the police he again said that he had made them under the threat that his wife would be charged. Upon that counsel for the prosecution indicated that he wished to put "certain further questions." The learned Chairman said that, while counsel was strictly entitled to do so, he himself would have thought it would not be necessary. Counsel then put to the appellant, and the appellant agreed, that he had a long record of crime behind him; details of various convictions for dishonesty were then put.

N. R. Blaker for the appellant. It was not clear from the transcript of evidence whether the appellant was alleging that the inducement was made by Detective Constable Thomas, a witness, or some other police officer who was not called as a witness. If the latter, the appellant did not put his character in: WESTFALL (1912) 7 Cr.App.R. 176. Since this man was defending himself, that should have been clarified by the prosecution before applying to put his character in. Even if the reference were to Detective Constable Thomas, the allegation did not go far enough to let the appellant's character in;

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it was not an attack on the witness's integrity. [He referred to ROUSE [1904] 1 K.B. 184; BRIDGWATER [1905] 1 K.B. 131; PRESTON, 2 Cr.App.R. 24; [1909] 1 K.B. 568; GRANT (1910) 3 Cr.App.R. 64; BIGGIN, 14 Cr.App.R. 87; [1920] 1 K.B. 213; TURNER, 30 Cr.App.R. 9; [1944] K.B. 463; STIRLAND *v.* D. P. P., 30 Cr.App.R. 40; [1944] A.C. 315; and O'HARA *v.* H.M. ADVOCATE, 1948 S.C.(J.) 90, in which serious attacks were made upon police officers and prosecution witnesses which it was held did not justify putting in the character of the accused; as compared with WRIGHT (1910) 5 Cr.App.R. 131; RAPPOLT (1911) 6 Cr.App.R. 156; HUDSON, 7 Cr.App.R. 256; [1912] 2 K.B. 464; WM. JONES (1923) 17 Cr.App.R. 117; DUNKLEY, 19 Cr.App.R. 78; [1927] 1 K.B. 323; JENKINS (1945) 31 Cr.App.R. 1; and CLARK, 39 Cr.App.R. 120; [1955] 2 Q.B. 469, where similar attacks had been made and the court upheld the putting in of the character.] There is clearly no fixed rule and one is therefore forced to the conclusion that the courts have regarded the matter as a question of discretion: JENKINS (*supra*); O'HARA *v.* H.M. ADVOCATE (*supra*). The Deputy-Chairman failed to warn the appellant who, not being represented, might not have realised his position. In all the circumstances a court should have exercised discretion in his favour.

J. H. Inskip for the Crown. It is clear that merely to say that a prosecution witness is telling lies does not let in the character of the prisoner (ROUSE (*supra*); WESTFALL (1912) 7 Cr.App.R. 176), but if the attack is not on the witness's evidence, but his character outside the evidence given by him, there is an imputation on the character of the witness within the meaning of the proviso: BRIDGWATER (*supra*); WM. JONES (*supra*); HUDSON (*supra*), where the law was definitely laid down that the words of the proviso must be given their natural interpretation and that no attempt should be made to read into them words more favourable to the defence. [He referred also to WM. JONES (*supra*) and DUNKLEY (*supra*).] It has come to be recognised that cases of rape are in a special position by reason of the fact that the non-consent of the

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prosecutrix is an ingredient of the offence: PRESTON (*supra*); TURNER (*supra*). The only real difficulty arises from the passage in the speech of Viscount Simon in STIRLAND *v.* D. P. P., 30 Cr.App.R. 40, at p. 54; [1944] A.C. 315, at p. 327, where it is stated: "An accused is not to be regarded as depriving himself of the protection of the section because the proper conduct of his defence necessitates the making of injurious reflections on the prosecution or his witnesses." It was, however, said in JENKINS (1945) 31 Cr.App.R. 1, at p. 13: "We cannot think that it was intended in any sense in the House of Lords to overrule the decision of the court in HUDSON's case (*supra*)" and HUDSON (*supra*) has since been affirmed in O'HARA *v.* H.M. ADVOCATE (*supra*), CLARK (*supra*) and CUNNINGHAM (1958) 43 Cr.App.R. 79.

Cur. adv. vult.

At the conclusion of the arguments the court stated that the appeal would be dismissed and that reasons for their decision would be given at a later date.

March 23. The judgment of the court was read by

DEVLIN J. On September 26, 1958, the appellant was sentenced at Somerset Quarter Sessions to a term of four years' imprisonment for obtaining a motor-car by false pretences and to a term of three years concurrent for receiving five banker's cheque forms knowing them to have been stolen. On March 9, 1959, this court heard his appeal against conviction and sentence and dismissed it. There is only one point in the appeal that deserves serious consideration and that is the contention that the appellant was improperly cross-examined about his previous convictions.

[His Lordship then stated the facts as set out above, and continued:] In the circumstances of this case and under the provisions of the Criminal Evidence Act, 1898, s. 1 (*f*) (ii), those questions were permissible only if the nature or conduct

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of the defence was such as to involve imputations on the character of Detective Constable Thomas.

It is clear from the subsection as a whole that it does not intend that the introduction of a prisoner's previous convictions should be other than exceptional. The difficulty about its phraseology is that unless it is given some restricted meaning, a prisoner's bad character, if he had one, would emerge almost as a matter of course. Counsel for the defence could not submit that a witness for the prosecution was untruthful without making an imputation upon his character; a prisoner charged with assault could not assert that the prosecutor struck first without imputing to him a similar crime.

The authorities show that this court has endeavoured to surmount this difficulty in two ways. First, it has in a number of cases construed the words as benevolently as possible in favour of the accused. Secondly, it has laid it down that in cases which fall within the words the trial judge must not allow as a matter of course questions designed to show bad character; he must weigh the prejudicial effect of such questions against the damage done by the attack on the prosecution's witnesses and must generally exercise his discretion so as to secure a trial that is fair both to the prosecution and to the defence.

The judgments in many of the earlier cases are based upon a limited construction of the statute. Thus in ROUSE [1904] 1 K.B. 184, it was held that a statement by the prisoner in cross-examination that the prosecutor was a liar must be regarded only as an emphatic denial of the truth of the charge against him and did not enable the prosecution to put his character in issue. Cases of rape have given rise to a peculiar difficulty; the prisoner cannot assert that the connection was with the consent of the prosecutrix without making imputations against her chastity. There was for a long time a difference of opinion about the effect of this; it was not definitely settled in favour of the defence until TURNER (1944) 30 Cr.App.R. 9; [1944] K.B. 463, a case which was shortly

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after approved by the House of Lords in STIRLAND *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 30 Cr.App.R. 40, at p. 54; [1944] A.C. 315, at p. 327. At the same time this court has refused, as a general rule, to read words into the section that are not there. This was plainly laid down by a full court in HUDSON, 7 Cr.App.R. 256; [1912] 2 K.B. 464, in the following terms at pp. 262 and 470 of the respective reports: "We think that the words of the section, 'Unless . . . the nature or conduct of the defence is such as to involve imputations,' etc., must receive their ordinary and natural interpretation, and that it is not legitimate to qualify them by adding or inserting the words 'unnecessarily' or 'unjustifiably' or 'for purposes other than that of developing the defence,' or other similar words."

We need not go through the cases in detail. They were all carefully reviewed in the Scottish case of O'HARA *v.* H.M. ADVOCATE, 1948 S.C.(J.) 90, and the effect of them is succinctly stated at p. 97 by the Lord Justice Clerk as follows: "The net result seems to be that the Court of Criminal Appeal in England adheres to HUDSON (*supra*) with certain modifications in cases of rape and subject to the discretionary power of the presiding judge." Since then HUDSON (*supra*) has been again applied by this court in CLARK, 39 Cr.App.R. 120, at p. 125; [1955] 2 Q.B. 469, at p. 474.

The alternative approach to the problem has been by the application of the general rule that the trial judge must always exercise his discretion so as to prevent the introduction of material whose prejudicial effect would outweigh its evidential value. The point that under this subsection the judge had a discretion was first made by Lord Sankey L.C. in MAXWELL *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 24 Cr.App.R. 152, at p. 173; [1935] A.C. 309, at p. 321. It was made again by Lord Simon L.C. in STIRLAND *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 30 Cr.App.R. 40, at p. 51; [1944] A.C. 315, at p. 324. The principle was first elaborated in JENKINS (1945) 31 Cr.App.R. 1. In that case this court reaffirmed HUDSON (*supra*) and then dealt with the question of discretion. Singleton J. said, at

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p. 14: "The subsection was intended to be a protection to an accused person. A case ought to be tried on its own facts and it has always been recognised that it is better that the jury should know nothing about an accused person's past history if that is to his discredit. Just as it was recognised by the legislature that this was fair and proper, so it was recognised that if the nature or conduct of the defence was such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution, it was equally fair and proper that counsel for the prosecution should have the right to ask questions tending to show that the accused person has committed or been convicted of an offence other than that which is under investigation. If and when such a situation arises, it is open to counsel to apply to the presiding judge that he may be allowed to take the course indicated, as was done in this case. Such an application will not always be granted, for the judge has a discretion in the matter. He may feel that even though the position is established in law, still the putting of such questions as to the character of the accused person may be fraught with results which immeasurably outweigh the result of questions put by the defence and which make a fair trial of the accused person almost impossible. On the other hand, in the ordinary and normal case he may feel that if the credit of the prosecutor or his witnesses has been attacked, it is only fair that the jury should have before them material on which they can form their judgment whether the accused person is any more worthy to be believed than those he has attacked. It is obviously unfair that the jury should be left in the dark about an accused person's character if the conduct of his defence has attacked the character of the prosecutor or the witnesses for the prosecution within the meaning of the section. The essential thing is a fair trial, and that the legislature sought to ensure by section 1, subsection (*f*)."

In our opinion, the difficulties created by this subsection are as a general rule best dealt with in accordance with the principle in HUDSON (*supra*) as applied in JENKINS (*supra*). The attempt to give the words a limited construction has led

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to decisions which it is difficult to reconcile; now that it is clearly established that the trial judge has a discretion and that he must exercise it so as to secure that the defence is not unfairly prejudiced, there is nothing to be gained by seeking to strain the words of the subsection in favour of the defence. We think, therefore, that the words should be given their natural and ordinary meaning and that the trial judge should in his discretion do what is necessary in the circumstances to protect the prisoner from an application of the subsection that would be too severe. It may be that, as indicated in O'HARA *v.* H.M. ADVOCATE (*supra*), cases of rape should be regarded as *sui generis*; certainly the peculiar questions to which they give rise have been settled by TURNER (*supra*), and that case has determined how the discretion should be exercised. No equally clear guidance can be given in cases where the subject-matter is not so specialised. In particular, no firm rule has been, or can be, laid down to govern the sort of circumstances we have to consider here where the defence involves a suggestion of impropriety against a police officer. The cases on this subject-matter—in particular PRESTON, 2 Cr.App.R. 24; [1909] 1 K.B. 568; WM. JONES (1923) 17 Cr.App.R. 117; and CLARK (*supra*)—indicate the factors to be borne in mind and the sort of question that a judge should ask himself. Is a deliberate attack being made upon the conduct of the police officer calculated to discredit him wholly as a witness? If there is, a judge might well feel that he must withdraw the protection which he would desire to extend as far as possible to an accused who was endeavouring only to develop a line of defence. If there is a real issue about the conduct of an important witness which the jury will inevitably have to settle in order to arrive at their verdict, then, as Singleton J. put it in JENKINS (*supra*) and Lord Goddard C.J. repeated in CLARK, 39 Cr.App.R. 120, at p. 125; [1955] 2 Q.B. 469, at p. 479, the jury is entitled to know the credit of the man on whose word the witness's character is being impugned.

We now apply these principles to the circumstances of this case. In our judgment, when the prosecution's evidence of an

admission made to a police officer is met by saying that it was extorted by means of a threat that otherwise the prisoner's wife would be charged, the defence is so conducted as to involve an imputation on the character of the police officer. The issue therefore becomes one of discretion. It is well settled that this court will not interfere with the exercise of a discretion by the judge below unless he has erred in principle or there is no material on which he could properly have arrived at his decision. But in this case we are not satisfied that the learned judge really exercised his discretion at all. He allowed the questions to be put because he thought that counsel was strictly entitled to do so, although he, the learned Chairman, queried whether it was necessary. Accordingly, it falls to us to exercise our own discretion in the matter.

Mr. Blaker did not dispute that the conduct imputed to the police officer was grossly improper, but he submitted that it was not like a charge of fabrication or concoction which goes to the root of a witness's integrity and which, if accepted, destroys the whole of his evidence on every point in the case. He submitted, also, that the attack was not pointedly directed against the witness under cross-examination, but was made against the police generally. The charge was not elaborated or pressed; it was repeated several times, but that was probably because the prisoner is a man who often repeats himself. Finally, Mr. Blaker made the substantial point that no warning was given to the accused before his convictions were put to him. In cases of this sort where there is no hard and fast rule, some warning to the defence that it is going too far is of great importance; and it has always been the practice for prosecuting counsel to indicate in advance that he is going to claim his rights under the subsection or for the judge to give the defence a caution. This is especially needful when the prisoner, as here, was not represented, though it is fair to say that he professed familiarity with the law and rejected the legal aid that had been assigned to him. We have come to the conclusion that the questions ought not to have been put.

It is not often in this type of case that the proviso to

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section 4 (1) of the Criminal Appeal Act, 1907, can properly be applied. But here, in our judgment, the case against the appellant is overwhelming. The evidence for the prosecution called for some reasonable explanation by him about how he came to be in possession of the cheque forms and to use one with a fictitious signature on it. The prisoner's story was that a motor dealer called Todd, who had died just before the trial took place, offered him a car for £300. The appellant agreed to buy the car; he had only got £165 but proposed to collect the balance off his mates in the morning. Mr. Todd then told the appellant to collect the car from Mr. Long and for this purpose gave him the cheque signed in the name of Pratten for £430; this meant that Todd would have been losing £130 on the transaction. No one in his senses could believe a story of this sort. Apart from all its inherent improbability, it was quite inconsistent with the statements made by the appellant to Detective Constable Thomas. Finally, we may add that the learned Chairman gave to the jury a proper direction about the limited effect of the appellant's bad character.

Although we think that the Chairman in his discretion should have refused to allow the appellant to be cross-examined as to his previous convictions, we are satisfied that the only reasonable and proper verdict on the facts was one of Guilty and that there has been no miscarriage of justice. It is for that reason that we dismissed the appeal.

Appeal dismissed.

Solicitors: Stileman, Neate & Topping, agents for Fryer, Bennett & Deal, Weston-super-Mare, for the Crown.

BEFORE

MR. JUSTICE FINNEMORE, MR. JUSTICE GORMAN AND MR. JUSTICE SALMON

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Jury — Question to Judge after Retirement — Two Prisoners Originally Charged — No Evidence Offered by Crown against One—Jury Directed to Return Verdict of Not Guilty—Discharged Prisoner Called as Witness by Crown — Request to Judge for Reason why Prisoner Discharged—Explanation by Judge—No Irregularity in Trial.

The appellant was charged with the capital murder and P. with the murder of a woman whose house had been entered by P. and the appellant in order to steal her property. They were jointly indicted, but the Crown offered no evidence against P. and the jury were directed to return a verdict of Not Guilty in his case. By consent of the defence the same jury then proceeded to try the appellant, and P. was called as a Crown witness during the trial. After retiring on the conclusion of the summing-up the jury returned to court and asked to be told why they had been directed to find P. Not Guilty. The judge told them that the reason was that the only evidence against P. was in the statement of the appellant made in P.'s absence, which was not admissible evidence in law.

Held, that there was nothing improper or irregular in the course adopted by the judge on receiving the question from the jury.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on March 4, 1958, of capital murder and was sentenced by Donovan J. to death.

The case for the prosecution was that the appellant went with two other men, Pritchard and Uhlrich, to a bungalow in Harlington Road, Hillingdon, intending to steal from it. Uhlrich (who was not charged with murder) was posted as a look-out man at the gate of the bungalow and the other two men went into the garden. The appellant went into the garden

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with Pritchard and prised open the scullery door. The old lady who lived in the bungalow came out and asked the two men to leave. The appellant then put his hand over her mouth and, as he alleged, pushed her into a penthouse, where she fell and hit her head. Subsequently, when the appellant and Pritchard were together one or other of them hit her on the head repeatedly with a tyre lever, causing her death. Pritchard and the appellant were both committed for trial, charged with the murder of the woman. Each made statements in which each charged the other with the murder. At the trial the Crown called no evidence against Pritchard, and he was formally acquitted by the jury.

He was subsequently called as a witness for the prosecution. With the consent of the defence the jury which tried Pritchard also tried the appellant.

Mrs. Uhlrich gave evidence that she heard the appellant say to her son "I have done the old lady," and saw him produce from his pocket a tyre lever covered with blood and hair.

After the jury had retired for nearly an hour they sent a note to the judge, asking to be told why they had been directed to find Pritchard Not Guilty. The judge thereupon recalled the jury to the court and told them that the Crown had decided not to proceed with the charge against Pritchard, because the only evidence which there was against him was contained in the statement made by the appellant, which would not have been admissible as evidence against Pritchard.

Tristram Beresford, Q.C. (*John Rogers* with him) for the appellant. What the judge told the jury with regard to the reason for the Crown dropping the case against Pritchard was not strictly accurate, since there was in fact evidence on the depositions against Pritchard, quite apart from the statement made by the appellant. The chief objection, however, to the judge telling the jury about the Crown's decision and the reason for it is that all that information had hitherto been carefully kept from the jury. The judge, in effect, was giving

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evidence himself, and this court has repeatedly said that no fresh evidence must be introduced after the jury have once retired. Further, the summing-up was unsatisfactory, in that it contained a most inadequate direction on the necessity of the evidence of Pritchard being corroborated. Pritchard was, it is submitted, an accomplice in the crime and, as such, required corroboration in practice.

Christmas Humphreys, Q.C. (*E. J. P. Cussen* with him), who was called on to argue this point only. The Crown do not admit that Pritchard was an accomplice, Their case is that he took no part in the murder, but actually tried to prevent it.

At the conclusion of the arguments Finnemore J. said that the judgment of the court would be delivered in a day or two.

Cur. adv. vult.

April 10. The following judgment was delivered by

FINNEMORE J. [after stating the facts]: Some objections were taken to the summing-up, and in addition there was an objection based on something which happened after the jury retired. It is important to point out that when Pritchard came before the court the prosecution offered no evidence against him, and the jury which tried the appellant returned, on the judge's direction, the formal verdict of Not Guilty in the absence of evidence. The defence were asked if they wished to have another jury, but said that they were satisfied to go on with that jury. In the course of their retirement the jury sent a note to the judge to ask him why no evidence was offered by the prosecution against Pritchard and why they were instructed to find him not guilty. The judge told them that it was a little technical, but the only evidence against Pritchard was in the statement of the appellant and, as that statement was made in Pritchard's absence, it was not admissible in evidence against him.

It is contended, and Mr. Beresford put it forward as his chief point, that that was contrary to the principle recognised in OWEN, 36 Cr.App.R. 16; [1952] 2 Q.B. 362 and WILSON

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(1957) 41 Cr.App.R. 226 which is that, once a summing-up has been concluded, no further evidence can be given in the case either by a new witness being called or an existing witness being recalled. This court is quite unable to see how that principle can possibly apply to this case. No new evidence was called. The judge was not giving evidence. What he was doing was telling the jury why Pritchard had not been proceeded against further, because there was not any evidence which in law could properly be put before the jury and cause him to be put on his trial. In the opinion of this court that bears no analogy whatever to the very strong principle which is always followed, irrespective of the merits, that no evidence must be given after the summing-up has been concluded. One would add, as one is anxious to make sure that justice is done, that one does not see how it could have acted prejudicially towards the appellant. The jury had heard the evidence, and the matter would not and ought not to have affected their verdict at all.

The other point which was put forward was that there was no proper direction on corroboration and that the jury were not properly directed that the evidence of an accomplice must be corroborated; also that the judge told them that there was corroboration, whereas he should have told them that there was evidence which they could accept as corroboration. The first point is: was Pritchard an accomplice? and in strict law that means an accomplice to the crime of murder. That would have been a matter for the jury to decide, and the judge might have said to the jury that they should consider whether Pritchard was an accomplice or not to the murder, which would have depended entirely on the evidence of the appellant, and that if they had to treat his evidence as that of an accomplice it needed corroboration. The judge did not do that. He did something which, it seems to us, was more favourable to the defence, because he told them that Pritchard was an accomplice, true an accomplice to the thieving, but also to be treated as an accomplice in his evidence on the murder. What the judge said was this: "If it were a

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question simply of Pritchard's word against this accused, then you would do well to be careful, because both are admitted villains. It is true that Pritchard was at least an accomplice in the thieving, and one does not accept the word of accomplices, although you would be entitled to if you thought they were telling the truth, unless there is some sort of corroboration." We agree that that is a short and compact way of expressing the matter, but it puts the jury plainly in this position, that they are to treat the evidence of Pritchard as that of an accomplice and that they ought not to act on it unless there is corroboration.

The second point on this matter was that the judge did not tell the jury what corroboration meant, but did say to them: "Pritchard has ample corroboration of his story and the accused has none." It is the usual practice, first of all, to tell the jury that corroboration means evidence which supports the accomplice's story that the crime was committed and that the accused person was implicated in it. It is also customary to say that the facts are for them to decide, and it is for them to decide whether the facts relied on as corroboration amount to corroboration. The judge went on to say what the corroboration was: "The corroboration of Pritchard's story is the evidence of the two Uhlrichs that when the appellant got back he said 'I have done the old lady,' and produced the tyre lever with the grisly remains upon it. If that evidence were accepted by the jury, it could not be anything but corroboration, and nobody, except out of sheer perversity, could say on that evidence that it was anything other than overwhelming corroboration. We were referred to a case in 1956 reported only in *The Times* newspaper which said that the question of corroboration was for the jury and not a matter of law for the court. A man was charged with indecent assault, and the corroboration relied on was that he had patted a girl on the back and had undoubtedly been friendly with her. The chairman who tried the case said: "I direct you as a matter of law that that is corroboration." Of course that was wrong, because the acts might be equivocal and it was for the jury to

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say what interpretation was to be placed on them. But in this case, if it is true that the appellant said " I have done the old lady. I hit her on the head with the bar," and then produced the tyre lever with the blood and hair on it, no person in his senses could think that was anything other than the plainest possible corroboration. We have, therefore, come to the conclusion that there is nothing wrong in the summing-up with regard to this matter. Pritchard was treated as an accomplice. The jury were warned about relying on him only. They were told that there was corroboration, and there was corroboration. In the interests of justice one should say that there was other corroboration as well, corroboration which did not depend on oral evidence at all. [His Lordship referred to a number of matters in the evidence, and continued:] It would hardly be unfair to say that the corroboration of Pritchard was overwhelming.

There is no other point which arises in this appeal, and, in the result, the appeal must be dismissed.

Appeal dismissed.

PRACTICE NOTE

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CONSECUTIVE SENTENCES

THE LORD CHIEF JUSTICE: The court's attention has been drawn to a difficulty which sometimes arises when a sentence is expressed to begin " at the expiration of the term of imprisonment you are now serving," or words to the same effect. If, as sometimes happens, the prisoner is already subject to two or more consecutive terms of imprisonment, the effect of such a formula is that the new sentence will begin at the expiration of the term he is *then* serving which may be the first of two consecutive terms. This will often not be the intention of the court giving the new sentence.

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PRACTICE NOTE: CONSECUTIVE SENTENCES

It is suggested that the simplest course would be to use some such formula as "consecutive to the total period of imprisonment to which you are already subject." The only exception to the use of such a formula would be if the intention was that the new sentence should be concurrent with one of the previous sentences.

It has been arranged that Prison Governors should in appropriate cases add to the list of previous convictions supplied to the court a footnote indicating that the prisoner is already subject to consecutive sentences and giving details of them.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DONOVAN AND MR. JUSTICE SALMON

DENNIS GAMMON

1959
April 20

Gross Indecency—Attempt to Procure—What Constitutes Attempt —Invitation Conveying Intended Purpose to Recipient— Summing-up—Corroboration.

An apparently innocent invitation, albeit accompanied by the intention on the part of the invitor to commit an immoral act, does not amount to an attempt to procure the commission of an act of gross indecency; but such an intention, accompanied by an invitation making it clear to the recipient what is intended, will amount to an attempt.

COPE (1921) 16 Cr.App.R. 77 and MISKELL (1954) 37 Cr. App.R. 214; [1954] 1 W.L.R. 438 followed.

WOODS (1930) 22 Cr.App.R. 41 distinguished.

In offences of this nature corroboration is always looked for, whatever the age of the complainant, and it is the duty of the court to warn the jury that they should be careful not to convict in the absence of corroboration unless the evidence completely satisfies them of the guilt of the prisoner.

Appeal against conviction and sentence.

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Parker L.C.J., Donovan J., Salmon J.

The appellant was convicted at East Kent Quarter Sessions on January 7, 1959, of attempting to procure acts of gross indecency with seven boys aged 14 to 17, and was sentenced by the Deputy-Chairman (Christmas Humphreys, Esq., Q.C.) to eighteen months' imprisonment.

The appellant, who was a baker's roundsman, between the end of August and October 23, 1958, according to the evidence for the prosecution, stopped a number of boys while he was driving his van and invited them into his van to commit acts of gross indecency with him. In no case was there any corroboration of the evidence of any boy. The material parts of the summing-up appear in the judgment.

Malcolm Morris, Q.C., for the appellant. Even if the evidence of the boys was believed, the appellant's conduct did not go far enough in any case to amount to an attempt to procure the commission of an act of gross indecency. Some act more proximate to an actual physical attempt is necessary. It is true, on the authority of COPE (1921) 16 Cr.App.R. 77 and MISKELL (1954) 37 Cr.App.R. 214; [1954] 1 W.L.R. 438, an invitation to a boy may constitute an attempt, but the invitation must be in clear and unambiguous terms, such as would make it clear to the invitee what is contemplated by the invitor. Here such invitations as were issued by the appellant were far too vague. Further, the manner in which the question of corroboration was dealt with in the summing-up was quite unsatisfactory. Corroboration should always be looked for in cases such as the present, and a clear warning should be given to the jury on the danger of acting without corroboration. Here the Deputy-Chairman whittled away the danger in his observations to the jury. It cannot be suggested that there was corroboration in any of the cases, and a particularly careful warning was necessary by reason of the fact that the boys knew each other and were to some extent in association.

A. Babington, for the Crown, Where an invitation to commit an act of gross indecency is issued, and its purport

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is understood by the invitee, the invitation need not be in precise terms and may be couched in innocent language: COPE (*supra*); MISKELL (*supra*). If the purpose of the invitation is understood by the invitee, the attempt is complete. It is on this ground that these two cases can be distinguished from WOODS (1930) 22 Cr.App.R. 41, where the tenor of the letters did not make it clear to the recipient that homosexual conduct was contemplated. It is true that the warning with regard to corroboration was less strong than is sometimes given, but in the circumstances of the case the warning was sufficient.

THE LORD CHIEF JUSTICE: This appellant was convicted at the East Kent Quarter Sessions of attempting to procure acts of gross indecency with seven boys aged 14 to 17, and he was sentenced to eighteen months' imprisonment. He now appeals to this court against his conviction and sentence.

This man, who was a baker's roundsman of about 22 years of age with no previous convictions and married, appears over a period from the end of August to October 23, 1958, to have stopped a number of boys while he was driving his van and, using quite general terms, invited them into his van there to perform acts of gross indecency with him. He was convicted on all seven counts, and Mr. Morris, who appears on his behalf, has taken a number of points.

I think it is sufficient for the purposes of this appeal to deal with two of them. He says, in the first place, that the evidence of the boys, even if believed, was not such as to constitute the offence of attempting to procure acts of gross indecency. He points to the fact that the Deputy-Chairman in summing up said this: "Gross indecency is a technical term in our law, but I tell you as a matter of law that if you find in any particular case that this man was accosting a particular boy and inviting him to some act of indecency such as mutual masturbation you may find that invitation is evidence of this offence, that he was attempting to procure him to commit an act of gross indecency with him." Mr. Morris submits that that is wrong and that some act more proximate to the actual physical

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attempt is necessary in order to constitute the attempt to procure acts of gross indecency. No doubt, every case must depend upon its own facts. It may well be that an invitation to commit an act of gross indecency at some future date before which arrangements are to be made would not constitute an attempt; at any rate, it might be a matter to be left to the jury whether on those particular facts there was such an attempt. But on the facts of this case where a man stops his van and invites the boy into the van for the clearly expressed purpose of gross indecency, it seems to this court that that invitation clearly constitutes an attempt.

Our attention has been called to a number of cases: first, COPE (1921) 16 Cr.App.R. 77, where the Lord Chief Justice, Lord Trevethin, gave a reserved judgment. In that case there had been a written invitation. Although the written invitation did not on its face say that the proposed meeting was for immoral purposes, from the very circumstances it must have been obvious to the recipient that that was the sole purpose of the invitation, and in those circumstances the court held that that letter did amount to an attempt. Lord Trevethin said this at p. 82: "It is also clear that if it were shown that letters, on the face of them innocent, in fact contained a code known to their addressee by means of which he would receive through the apparently innocent letter a plain invitation to commit such an act the letters would constitute an attempt to procure the commission of the crime."

Going the other way was the case of WOODS (1930) 22 Cr.App.R. 41, where the letter was not in such terms as to convey to the recipient that the object was an immoral object. The case of COPE (*supra*) was referred to with approval, and it was pointed out by Avory J., at p. 45, that in COPE's case (*supra*) the letters were in such terms "that the intended recipient in that case would, in the circumstances, see in the letter an invitation to commit an act of gross indecency with a male person." Then he goes on: "In the circumstances of the present case no such invitation can be implied from the letters as understood by the recipient."

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Finally, reference was made to MISKELL (1954) 37 Cr.App. R. 214; [1954] 1 W.L.R. 438, where again it was emphasised that the invitation and the acts accompanying the invitation were such as to make it perfectly clear that an immoral purpose was in mind. In other words, it seems to us that the effect of those cases is this, that an apparently innocent invitation, albeit accompanied by the intention on the part of the invitor to commit an immoral act, does not amount to an attempt, but such an intention accompanied by an invitation making it clear to the recipient what is intended will amount to an attempt. Here, as I have said, the matter was not left to the jury, but in the opinion of this court it is plain that the invitation in the manner I have described could only be an attempt and nothing less than an attempt.

Secondly, Mr. Morris complains of the passage in the summing-up dealing with corroboration, or rather with the absence of corroboration. The passage is in these terms: "I will tell you now something which is in his favour in the sense that it is a matter which, in a case of this kind, you will bear in mind; it is the danger always present where youths of this age group, 14 to 17, are giving evidence of alleged sexual offences against a grown man that they may be affected consciously or unconsciously by the period of life when they are coming to puberty and imagine all sorts of things which never happen and give evidence which sometimes (though they do not realise it) is in fact completely untrue. It applies much more to girls than boys, but we who have had long experience of these cases know that the evidence of a girl giving evidence of indecency by a man is notoriously unreliable, and you look in those cases for some other evidence making it more likely that her story is true. It does not apply nearly as much in the case of boys. It applies to some extent. It does not apply so much where the boys are 16 and 17. Here the youngest boy, I think, is 14. Nevertheless, I think it right to give you a general but vague warning that you are dealing with the evidence of boys of what I might describe as a sexual age, and there is no independent evidence from some other source that

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the evidence of any particular boy is true. Having given you that warning, I do not want you to exaggerate it in the least. I do not want you to take it as expressing my view that it would not be safe to convict or anything of the kind." Mr. Morris points out, what is undoubtedly true, that in offences of this nature corroboration is always looked for, whatever the age of the complainant. It is always the duty of the tribunal in offences of this nature to invite the jury to look for corroboration and to warn them that they should be careful not to convict in the absence of corroboration unless the evidence completely satisfies them of the guilt of the accused. Here, be it observed, there is no reference to the fact that the nature of the offence alone requires corroboration, not as a rule of law but as a practical precaution. The need for corroboration is stated in the summing-up to be based solely on the age group of these complainants and the Deputy-Chairman went on: "It does not apply nearly as much in the case of boys. It applies to some extent." That, as it seems to the court, is watering down, if I may use that expression, the principle still further and in effect telling the jury that there is very little danger, although it is a matter that he must refer to. Then there is the further reference to it being "a general but vague warning," and finally in the last passage I read it is said that it is not a matter which the jury are to exaggerate in the least. This court has said many times that in warning a jury in regard to corroboration in cases of this sort no particular formula is required so long as the sense of the rule of practice is brought home to the jury. Here, the court feels that, so far from giving the ordinary warning that they must approach the matter with extreme care and only convict if they are quite satisfied as to the prisoner's guilt, the Deputy-Chairman is minimising the danger involved and telling the jury in effect that it is only a trifling danger which they are being invited to disregard. The court is very loth to interfere in a case of this sort where the evidence, although uncorroborated, was very strong. Nevertheless a clear direction was called for and all the more so when the boys all knew each other and for one

purpose at any rate, namely, the alleged purpose of catching the appellant, had joined together. That being so, the court feels that it would be wrong to allow this conviction to stand in the light of that passage in the summing-up to which I have referred, and it being a case in which it would be impossible to apply the proviso, this appeal must be allowed.

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Conviction quashed.

Solicitors: Girling, Wilson & Harvie, Herne Bay, for the appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DONOVAN AND MR. JUSTICE SALMON

JAMES ALFRED GEORGE HARMAN

1959
May 11

Appeal—Sentence—"Order . . . made on conviction"—Estreat of Recognisance—Term of Imprisonment in Default Consecutive to Term for Substantive Offence—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *ss.* 3 (*c*), 21.

By section 21 of the Criminal Appeal Act, 1907: "The expression 'sentence' includes any order of the court made on conviction with reference to the person convicted. . . ." "Order . . . made on conviction" in the above section means "order . . . made as a consequence of conviction."

R. *v.* LONDON SESSIONS, *ex p.* BEAUMONT [1951] 1 K.B. 557 applied.

Where, therefore, in the case of the appellant, who had been sentenced to three years' imprisonment for a substantive offence, in respect of which he had failed to surrender to his bail, the court ordered that his recognisance of £100 be estreated and that, in default of payment, he should serve a further sentence of six months' imprisonment consecutive to the three years,

Held, that the term of six months had nothing to do with the conviction and that there could be no appeal against it.

Appeal against sentence.

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The appellant pleaded Guilty at the County of London Sessions on February 10, 1959, to office-breaking and larceny and was sentenced by the Chairman to three years' imprisonment. He had failed to surrender to his bail and the Chairman ordered that his recognisance of £100 be estreated and that, in default of payment, he should serve a further six months' imprisonment consecutive to the three years. He desired to appeal against this latter sentence.

Peter Bruce for the appellant.

Harold Cassel for the Crown.

THE LORD CHIEF JUSTICE: This appellant, together with two other men, pleaded guilty at London Sessions to office-breaking and larceny, and he was sentenced to three years' imprisonment. He was on bail at the time of his trial and failed to surrender, and in sentencing him to three years' imprisonment the learned Chairman said this: "For this offence I think the appropriate sentence is that you go to prison for three years; your recognisance will be estreated; and you will have to report within the provisions of the Criminal Justice Act." Then later on that day he said, addressing the appellant: "Harman, I estreated your recognisance of £100 this morning, but I omitted to tell you what the alternative is if you do not pay. The alternative is a further six months, to be consecutive upon the three years to which I sentenced you."

The appellant now appeals to this court, not against his sentence of three years' imprisonment, but against what he says is a sentence of six months' imprisonment consecutive upon the three years if he does not pay the £100. As is well known, the jurisdiction of this court is limited by the Criminal Appeal Act, 1907, and in regard to sentences the jurisdiction is given by section 3 in these terms: "A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal . . . (*c*) with the leave of the Court of Criminal Appeal against the sentence passed on his conviction, unless the

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sentence is one fixed by law." By the same Act by section 21, the definition section: "The expression 'sentence' includes any order of the court made on conviction with reference to the person convicted."

Now on that Mr. Bruce, for the appellant, says, whatever may have happened in any other case, in this case the order of six months' imprisonment was an order of the court made on conviction, that is, at or about the time of conviction and with reference to the person convicted. That no doubt is true, but it seems perfectly clear to this court, quite apart from authority, that where the section says "any order of the court made on conviction," it must mean "made as a consequence of conviction." Indeed, the matter has already come before the Divisional Court in regard to corresponding words in section 36 of the Criminal Justice Act, 1948 [replaced by section 83 of the Magistrates' Courts Act, 1952]. There the section is in these terms: "A person convicted by a magistrates' court may appeal to a court of quarter sessions . . ." and by subsection (3): "In this section the expression 'sentence' includes any order made on conviction by a magistrates' court. . . ." In R. *v.* LONDON SESSIONS, *ex p.* BEAUMONT [1951] 1 K.B. 557, it was held by the Divisional Court that the words "any order . . . made on conviction" meant any order made as a consequence of a conviction and not an order made at the time of conviction.

The court feels that this is a very plain case and that here this sentence of six months had nothing to do with the conviction. It may have been given at the time of and while sentencing the man on conviction, but it had nothing to do with the conviction, any more than if he had been acquitted and the recognisance had been estreated and a period of imprisonment ordered in default of payment.

Accordingly, there is no jurisdiction in this court to entertain the appeal and it is dismissed.

Appeal dismissed.

Solicitor: The Solicitor, Metropolitan Police, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND MR. JUSTICE WINN

1959
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TERENCE EDWIN DANGERFIELD

Committal for Sentence — Five Charges — Sentence of Borstal Training and Disqualification on Each Charge Concurrent — Jurisdiction of Quarter Sessions — Variation of Sentence — Desirability of General Committal rather than Committal with view to Borstal—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 20 (5) (*a*)—*Magistrates' Courts Act*, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 55), *ss.* 28 (1), 29.

By section 20 (5) of the Criminal Justice Act, 1948: "Where an offender is so committed for sentence [by a magistrates' court to quarter sessions under section 28 (1) of the Magistrates' Courts Act, 1952], the following provisions shall have effect, that is to say:—(*a*) the appeal committee or court of quarter sessions shall inquire into the circumstances of the case and may—(i) if satisfied of the matters mentioned in subsection (1) [of section 28 of the Act of 1952] sentence him to Borstal training; *or* (ii) in any case, deal with him in any manner in which the court of summary jurisdiction might have dealt with him . . ."

The appellant was convicted at a magistrates' court on five charges of offences in relation to the taking and driving away of motor vehicles without authority and driving when uninsured, and was committed to quarter sessions for sentence under section 28 (1) of the Magistrates' Courts Act, 1952. Quarter sessions passed sentences of Borstal training and disqualification from holding or obtaining a driving licence on each charge, to run concurrently.

Held, that in view of the use of the word "or," where italicised, in section 20 (5) of the Act of 1948 quarter sessions had no jurisdiction on any one charge to pass any sentence in addition to the sentence of Borstal training, and that the sentences would be varied by ordering that in respect of the first four charges there should be concurrent sentences of Borstal training and in respect of the fifth an order of disqualification, being an order which the magistrates' court could have made.

Where an offender is over 17, magistrates should commit

to quarter sessions, in cases where it is practicable to do, under section 29 of the Act of 1952, which provides for a general committal for sentence and gives quarter sessions wider powers, rather than under section 28, which provides for a committal with a view to Borstal training.

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Appeal against sentence.

The appellant was convicted at Acton Magistrates' Court on five charges relating either to the taking and driving away of motor vehicles without authority or of driving when uninsured and was committed to Middlesex Quarter Sessions for sentence under section 28 (1) of the Magistrates' Courts Act, 1952. On February 19, 1959, he was sentenced by the Chairman (the Hon. Ewen E. S. Montagu, Q.C.) to sentences of Borstal training and disqualification for holding or obtaining a driving licence for five years on each charge, the sentences to run concurrently.

M. Worsley for the appellant. Section 28 (1) gives the court of quarter sessions only an alternative power of either (a) passing a sentence of Borstal training or (b) passing any sentence which the magistrates' court might have passed. The use of the word "or" makes it quite clear that the powers are alternative and not cumulative, and as in respect of each offence the court passed another sentence, namely, sentence of disqualification, in addition to the sentence of Borstal training, the sentences were bad in law as being in excess of jurisdiction and should be quashed.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: This appellant was convicted at the Acton Magistrates' Court of taking and driving away a motor-cycle without authority or insurance. He was committed to Middlesex Sessions under section 28 (1) of the Magistrates' Courts Act, 1952, and was then sentenced by the Chairman under section 20 (5) of the Criminal Justice Act, 1948, to Borstal training and disqualified for five years.

Two points are taken by Mr. Worsley on an appeal against

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that sentence: first, a point of law that in fact the sentence was in a form which is not permissible—I will deal with that in a minute—and secondly, that in any case Borstal training and disqualification for five years is too severe a sentence.

The court sees no reason to interfere with the sentence of Borstal training as a matter of principle. Here is a young man 17 years of age. He has been on probation for larceny. He has been to an approved school for two larcenies in dwelling-houses, fined for obstructing the police, fined for common assault and fined in August of last year for obstructing the police. It appears that he is a young man of very hot temper, and he must learn to control it. The Chairman thought, and indeed the magistrates must have thought because they committed him under that section, that Borstal training was the appropriate sentence for him. The court, having considered the matter, sees no reason to interfere. That is the question of principle.

The point of law that arises is this: The magistrates, as I have said, committed this young man to quarter sessions under section 28 (1) of the Magistrates' Courts Act, 1952. It is, the court thinks, perfectly clear that when that is done the powers of quarter sessions under section 20 of the Act of 1948 are limited, as subsection (5) in effect says, to sentencing the offender to Borstal training or—and it is an alternative—dealing with him in any manner in which the magistrates' court might have dealt with him. Accordingly, it is said that sessions cannot at one and the same time sentence an offender to Borstal training and disqualify him. That, the court feels, is perfectly clear, but in the present case there were no less than five charges, and, although in form the sentence of the learned Chairman is wrong because he in effect passed the sentence of Borstal training and disqualification in respect of each offence concurrently, yet it was within his power, and therefore within the power of this court, to provide that on four of the charges there should be concurrent sentences of Borstal training and that on the fifth the sentence should be one that the magistrates could have inflicted, namely,

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disqualification. Accordingly, this court will vary the sentence to one of Borstal training on four of the charges concurrently and five years' disqualification on the fifth.

I would like to add one further matter which is so often overlooked. In the case of a young man of 17, as this young man was, it is often possible for magistrates to commit him under section 29 of the Magistrates' Courts Act, 1952. That is a general committal for sentence, not merely for Borstal, and then under section 29 of the Criminal Justice Act, 1948, sessions will have complete power to deal with the matter and are not limited in the way in which they are where their powers are derived from section 20 of the Act. Accordingly, as this court has said before, magistrates should remember that in the case of a boy over 17 it is simpler to commit him under section 29, rather than under section 28, of the Magistrates' Courts Act of 1952.

Sentence varied.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE FINNEMORE AND MR. JUSTICE WINN

DAVID LANCELOT DI DUCA

1959
May 26

Murder — Diminished Responsibility — Abnormality Induced by "Injury" — Transient Toxic Effect of Drink — Question by Jury after Retirement—Homicide Act, 1957 (*5 & 6 Eliz. 2, c.* 11), *s.* 2.

The appellant, who was convicted of capital murder, relied, among other defences, on that of diminished responsibility, the suggestion being that he was suffering from abnormality of mind induced by "injury" within the meaning of section 2 (1) of the Homicide Act, 1957, namely, the toxic effect of drink, and that such abnormality so induced substantially impaired

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his responsibility. After retirement, the jury returned and asked the judge the following question: " . . . if a man's mind is impaired by the effects of alcohol, does the verdict come under that of manslaughter or murder? " The judge thereupon gave them the well-recognised direction with regard to the effect of drink on intent, without any reference to the effect of drink on diminished responsibility, and did not refer to this matter again in his summing-up. The judge, in his summing-up, directed the jury that there was no evidence of abnormality of mind and did not deal with the question of burden of proof under section 2 of the Homicide Act, 1957, put to him.

Held, that as on the facts of the case there was no evidence of abnormality of the mind of the appellant, the summing-up of the judge was not open to any criticism.

Semble, that the transient effect of drink, even if it does produce a toxic effect on the brain, cannot amount to " injury " within the meaning of section 2 of the Act of 1957.

Appeal against conviction.

The appellant was convicted at Hampshire Assizes on April 13, 1959, of capital murder and was sentenced by Cassels J. to death.

The appellant had entered the house of an elderly man for the purpose of stealing his money and, while doing so, was surprised and seized by the man. There was a severe struggle in the course of which the appellant pushed the man on to a bed and struck him several times on the head with a wash-basin. The facts are set out in more detail in the judgment.

At the trial the appellant relied on the defences of (i) self-defence, (ii) provocation, (iii) diminished responsibility, contending that he was suffering from abnormality of mind induced by " injury " within the meaning of section 2 of the Homicide Act, 1957, namely, the toxic effect of drink, and that such abnormality substantially impaired his responsibility. After retirement, the jury returned to court asking for a further direction with regard to the effect of drink in the following terms: " The jury wish to know whether or not, if a man's mind is impaired by the effects of alcohol, does the verdict come under that of manslaughter or murder? " The judge gave them the well-recognised direction on the effect of drink

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on intent, but did not refer to the effect of drink on diminished responsibility, nor did he refer to the matter again in his summing-up. He directed the jury, in his summing-up, that there was no evidence of abnormality of mind, and did not refer to the question of burden of proof under section 2 of the Homicide Act, 1957.

R. P. Croom-Johnson, Q.C. (*A. Mildon* with him) for the appellant. The judge's direction on the question of provocation was unsatisfactory, in that he told the jury that apprehension of injury arising from the conduct of the deceased man could not amount to provocation. This should have been left as a question of fact to the jury. A more serious complaint arises from the manner in which the judge dealt with the defence of diminished responsibility. In the first place the judge appears to have misunderstood the question on which the jury were seeking further direction. They obviously desired direction on the effect of drink on diminished responsibility, and neither then nor at any time in his summing-up did he give any direction on the matter. It is submitted that in the circumstances of the case such a direction was essential. The toxic effect of alcohol on the brain may amount to an "injury" under section 2 (1) of the Homicide Act, 1957. Again, the judge gave the jury no direction on the standard of proof laid on the defence with regard to diminished responsibility. [He referred to DUNBAR (1957) 41 Cr.App.R. 182; [1958] 1 Q.B. 36.]

J. T. Molony, Q.C. (*R. Stock* with him) for the Crown. There was hardly any evidence fit to be left to the jury on the question of provocation, but in considering the manner in which the judge dealt with this issue the whole of his summing-up on this topic should be considered, and, so regarded, it was perfectly satisfactory. There is no evidence of diminished responsibility within the meaning of section 2 of the Act of 1957 and the judge was right in so ruling, and, in view of that ruling, no direction on that issue was required. In any event, the temporary toxic effect of drink on the brain

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is not the kind of " injury " contemplated by section 2 (1) as inducing abnormality.

THE LORD CHIEF JUSTICE: This is an appeal by the appellant from his conviction at Winchester Assizes of the capital murder of a man of 67 of the name of Mullins.

The facts, so far as they are relevant, can be shortly stated. Mullins was a secondhand dealer. He had a small shop in Southsea where he bought and sold different kinds of goods. He lived a short distance away at No. 5, Western Parade. Apparently both there and at another address, No. 10, Elphinstone Road, he let furnished rooms. He was known to keep a quantity of ready cash either on him or in his rooms, no doubt for the purposes of his business.

About 4 p.m. on February 1 Mullins received such violent injuries in his bed-sitting room that he died shortly afterwards, death being due to asphyxia from the inhalation of blood. He had while on the bed in his room been hit at least twice, possibly three times, on the head and face with a washbasin weighing some 17 lbs. Further, money had been taken from his room.

The appellant was a young man of 21, a steward serving in the Royal Navy, and apparently earlier in the year while on leave he and another steward had rented one of Mullins' rooms or flats at Elphinstone Road. Accordingly, he had met Mullins and, indeed, had been to Mullins' bed-sitting room to pay the rent. Later, on Sunday, February 1, the appellant and three other stewards met and had drinks at a public house in Portsmouth. When closing time came, about 2 p.m., they found themselves short of money, and somebody mentioned Mullins' name, and there is no doubt that from that moment the appellant conceived the idea of stealing money from Mullins. He went first to Elphinstone Road to make inquiries where Mullins lived, because he had apparently forgotten. He could not find out the address, but before leaving he broke open the gas meter and stole some money and then apparently went to Western Parade, asking where Mullins was to be found.

Eventually he was told that Mullins lived at No. 5, and he went there and entered the front door. That was about 4 p.m. What happened then is largely to be derived from the appellant's own evidence. His account of what took place was this: He said that when he found Mullins' room he looked inside. There did not appear to be anybody there, so he went in and closed the door. He then began to search for money and found in a chest of drawers a pile of notes which he put into his pocket. As he did so—this was his account—someone grabbed him by the shoulder. He turned round and found that it was Mullins. Mullins, apparently, was a man about six-feet tall, weighing 20 stone, and he had the reputation of being a violent man. As he looked round he tried to get away, but Mullins, so he said, grabbed his raincoat. He thereupon punched Mullins in the stomach to get free, and in the course of the scuffle Mullins fell over on to the bed. The appellant said that he was frightened; that Mullins was mad and was likely to go for him. Having pushed him a second time on to the bed, he leant down and picked up the only weapon available, namely, this wash-basin, and he admits that there and then he hit Mullins over the head twice or three times with this basin. He had, he said, no intention of killing him; he only did what he did to stop Mullins from coming for him in order that he might get away. He said that he did not think he had hurt Mullins, much less killed him.

In those circumstances, three matters were raised by the defence: first, that these blows were given in self-defence; secondly, that the blows were the result of provocation; and thirdly, that the appellant at the time was suffering from an abnormality of mind substantially impairing his mental responsibility within section 2 (1) of the Homicide Act, 1957.

As regards self-defence, no criticism is made, or indeed could be made, of the summing-up. The facts were indeed overwhelming. The appellant, even assuming he was frightened of Mullins, had him on the bed and at his mercy before ever Mullins was hit. The appellant was able without any interference to pick up this wash-basin and, as he put it

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in his evidence, " I suppose his head," that is, Mullins' head, " was on the pillow when I hit him the second and third times."

As regards provocation, complaint is made of a passage in the summing-up. The passage in question is this: " Surely the thief cannot be heard to say ' I was provoked into killing a man because I thought he might detain me or injure me or remember me.' That will not do." It is agreed that the fear of detention or the fear of being remembered could not amount to provocation, but great reliance is placed on the words which appear in between, namely, " or injure me." It is said that the learned judge in that passage was inviting the jury to bear in mind that the appellant was engaged in theft and was really saying that the thief could not complain if he considered that the householder was going to hurt him, however seriously. The court, however, is clearly of opinion that in their context the words cannot be interpreted in that way. The passage in question comes in a paragraph dealing with motive and state of mind. The paragraph begins in this way: " Motive is not provocation. It may well be that dead men tell no tales. It may be that an escape after the commission of an offence is made the easier if the man who might pursue is rendered incapable of pursuit, if a man who might recognise is rendered incapable of recognition. Motive is not provocation. That cannot possibly be held to be provocation." Then follows the passage in question. The learned judge, as it seems to this court, is there saying that a state of mind is not enough and that there must be a reasonable apprehension of injury founded on the conduct of the deceased. Indeed, on the very next page he goes on to consider the conduct of the deceased and whether it could amount to provocation.

As regards diminished responsibility within section 2 of the Act, the case sought to be made by the defence was that the appellant was suffering from an abnormality of mind, that such abnormality was induced by injury, namely, the toxic effect of drink, and that such abnormality so induced substantially impaired his mental responsibility. Two complaints

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are made in regard to this. First, it is pointed out, what is undoubtedly true, that the learned judge failed to direct the jury on the standard of proof required in such a case as this where the burden of proof is on the defence. Reference is made to DUNBAR (1957) 41 Cr.App.R. 182; [1958] 1 Q.B. 36, where this court held that a jury must be directed that in all cases where the burden is on the defence the standard of proof is not as high as that required where the onus is on the prosecution.

The second complaint results from this: Apparently after the jury had retired for some time, they came back for a further direction in regard to the effect of drink, and the learned judge thereupon gave them an almost classic direction in regard to the effect of drink on intent. The jury's note is available and reads in this way: "The jury wish to know whether or not if a man's mind is impaired by the effects of alcohol does the verdict come under that of manslaughter or murder?" It certainly looks from the wording of that note, in particular the words "if a man's mind is impaired," as if they must have been referring to section 2 of the Homicide Act. Those are the very words of that section, and it does appear, accordingly, that the learned judge must have misunderstood the effect of their request.

The real question, however, as it seems to this court, is whether there was any evidence at all to go to the jury on this issue of diminished responsibility. It is said that the appellant had taken quite a lot of drink. That is undoubtedly true. It is also said that on the medical evidence drink can produce a toxic effect on the brain, and it is argued from there that a toxic effect on the brain is in law an injury within the section. Whether the transient effect of drink, even if it does produce such a toxic effect on the brain, can amount to an injury within the section is, we think, very doubtful, but it is unnecessary to come to a final conclusion on the matter in the present case, for assuming that it can amount to an injury, the first question is whether there was any evidence of abnormality of mind. In our judgment, there was none. It is true that the

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appellant's behaviour that afternoon was curious in that, while admittedly planning a theft, he made no attempt to hide his movements, but this, as it seems to us, was merely bravado induced by drink. His actions were rational enough, and there was nothing to suggest abnormality of mind. That being so, the learned judge was perfectly right in telling the jury, as he did, that there was no evidence of abnormality, and accordingly it matters not that he failed to give them the full and complete direction in regard to the onus of proof or, indeed, that he failed to say again what he had said before when the jury returned for further direction.

In these circumstances the court can see no reason to interfere, and this appeal is dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BYRNE AND MR. JUSTICE WINN

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Confession — Objection to Admissibility — No Ruling by Judge — Statement that Ruling could be Postponed till all Evidence before Jury.

Where objection is taken to the admissibility of an alleged confession, it is essential that the judge should hear evidence in the absence of the jury and give a ruling whether the confession should be admitted or not, and that the evidence of the alleged confession should not be put before the jury unless the judge has first ruled that it should be admitted.

Appeals against conviction.

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The appellants were convicted at Bristol City Quarter Sessions on January 8, 1959, as follows: On the first count of the indictment, Murphy was convicted of shopbreaking and larceny, and on the fourth and fifth counts both appellants of larceny of radio sets from cars. The second count was not proceeded with, and on the third count Francis pleaded guilty to receiving the radio sets referred to in count one. They were sentenced by the Recorder (G. D. Roberts, Esq., Q.C.), Francis to Borstal training and Murphy to twelve months' imprisonment and a supervision order under section 22 of the Criminal Justice Act, 1948 (concurrent).

At the trial objection was taken by defending counsel on behalf of both appellants to the admissibility of certain alleged confessions. The Recorder said that he could not rule on the issue of admissibility until all the evidence relating to the alleged confessions had been put before the jury. The evidence was, accordingly, put before the jury, but the Recorder in fact never did give a ruling.

I. Starforth Hill for both appellants. The procedure adopted was quite irregular. The recognised practice is that there should be a ruling by the judge on the issue of admissibility of disputed evidence before the evidence is put before the jury.

P. W. Esling for the Crown. It is conceded that the procedure adopted by the Recorder was unusual, but it is clear that the Recorder, if he had given a ruling, would have held the evidence of the confessions to be admissible and the court is asked to consider whether they should apply the proviso to section 4 of the Criminal Appeal Act, 1907.

THE LORD CHIEF JUSTICE: The matter which the court had in mind when granting the appellants leave to appeal was the manner in which the question of the admissibility of certain alleged confessions by both appellants had been dealt with by the Recorder. It is to be observed that there was hardly any evidence against either appellant other than statements made

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to the police at an early stage. When the detective constable who had taken the statements was being examined by counsel for the prosecution, objection was taken by counsel on behalf of both prisoners to the admissibility of those statements. The allegation was that the confessions had been obtained by promises of bail and matters of inducement of that sort. The Recorder, however, said that he could not rule on their admissibility until he had heard all the evidence, and that the simpler and better course would be for the evidence to be called before the jury first. In fact, the Recorder never gave his ruling. The matter was put before the jury and they were invited to say whether they believed that the confessions were obtained voluntarily or under inducements.

It has always been the settled practice in cases of this sort for a challenge to be made to the admissibility of the statement at an early stage in the absence of the jury. The matter is set out in the 34th (1959) edition of Archbold's *Criminal Pleading, etc.*, at paras. 1114 and 1115. "The proper course," it is said there, "where objection is raised to the admissibility of an alleged confession, is for the judge to hear evidence in the absence of the jury and to rule upon that evidence whether the alleged confession should be admitted or not." The passage goes on to say that the evidence of the prisoner may be admitted at that stage. Then, if the evidence is admitted, "the weight and value of a confession remain matters for the jury." It is quite clear that a prisoner is entitled both to a ruling on admissibility from the judge and also to hear the verdict of the jury on the weight and value of the confession. Although the criterion is the same, namely whether it is a voluntary confession, there may well be cases where the judge might not think it right to allow the confession to be put before the jury at all. If the course adopted in this case were adopted in all cases, something would come before the jury which the judge might at a later stage have to rule to be inadmissible. In the result, either the jury would be left with minds poisoned against the prisoner or they would have to be discharged and the trial started again. The court is of opinion

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that no departure should be made from what has always been the settled practice in these matters.

Furthermore, the matter was left to the jury in the form: Do you believe this statement or not? In no part of the summing-up did the Recorder clearly state to the jury that the onus was on the prosecution to satisfy them that the statements were voluntary. In the absence of a clear direction to that effect the court does not feel that this is a case in which it would be appropriate to apply the proviso to section 4 of the Criminal Appeal Act, 1907. In these circumstances, the only course open to the court is to quash the convictions on the first, fourth and fifth counts. On the third count, on which the appellant Francis pleaded Guilty to receiving and was sentenced to Borstal training, the conviction and sentence stand.

Convictions quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SLADE AND MR. JUSTICE WINN

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Sentence—Supervision Order—Failure to Register with Appointed Society — Notice by Society to Commissioner of Police for Metropolis — Prisoner Subject to Schedule I of Prison Act, 1952 — Obligation to Register Address at Appointed Police Station—Meaning of "Address"—Prisoner in Town during Night without Fixed Abode — Liability to Give Reasonable Identification of "Place" of Residence—Criminal Justice Act, 1948 (10 & 11 Geo. 6, c. 58), s. 22 (1) — Prison Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 52), s. 29 (1) (2), Sched. I, paras. 1 (1), 2 (1), 4 (1).

The appellant having failed to comply with a notice under section 29 (2) of the Prison Act, 1952, requiring him to notify

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his address to an appointed society, and the society having given notice of such failure under section 29 (1) (*b*) to the Commissioner of Police for the Metropolis, the appellant thereby became subject to the provisions of the First Schedule to the Act. Paragraph 1 (1) of that Schedule provides: "Any person to whom this Schedule applies shall—(*a*) register at an appointed police station in any police area in which he is from time to time residing the address of his residence . . ." Paragraph 4 (1) provides: "For the purposes of this Schedule, a person shall be deemed to reside at any house or other place of whatever description at which he spends a night." The appellant was convicted on indictment on a charge "that between the 18th and 20th days of February, 1959, in the City of Portsmouth, being a person to whom [the First Schedule] applied, [he] resided within the police area of Southsea Police Station, being the appointed police station for the said area, and that [he] unlawfully failed without reasonable excuse to register the address of [his] residence at said police station," contrary to paragraph 2 (1) of the First Schedule. The appellant had arrived in Portsmouth on February 18, 1959, and was arrested on the 20th and, according to the evidence which he ultimately gave, said that during that time he had no fixed abode, was wandering about the city and sleeping in a bus shelter.

Held, that "address" both in section 29 of the Prison Act, 1952, and the First Schedule thereto, is not confined to a place which has a postal address; that as the appellant had spent a night at a place of some description in Portsmouth, it became his obligation to register at the appointed police station a reasonable identification of that place; and that as he had failed to do so without reasonable excuse, he was rightly convicted.

The maximum sentence for an offence under paragraph 2 (1) of the First Schedule is six months' imprisonment, whether the offence is tried summarily or on indictment.

Appeal against conviction and sentence.

The appellant was convicted at Portsmouth Quarter Sessions on April 1, 1959, of failing to register the address of his residence at the appointed police station when he was a person to whom Schedule I of the Prison Act, 1952, applied, contrary to paragraph 2 (1) of that Schedule, and was sentenced by the Recorder to nine months' imprisonment.

On September 23, 1957, the appellant was sentenced to

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eighteen months' imprisonment and a supervision order under section 22 of the Criminal Justice Act, 1948, was made. On October 25, 1958, the appellant was discharged from prison and the Governor served on the appellant a notice requiring him to report and notify his address to the After-Care Association as the appointed society under section 29 of the Prison Act, 1952. The appellant failed to comply with the notice and the appointed society notified the Commissioner of Police of the Metropolis. The appellant thereby became subject to the provisions of the First Schedule to the Prison Act, 1952.

The appellant arrived in Portsmouth on February 18, 1959, and was arrested on February 20, and, according to the evidence which he ultimately gave, said that during the time he had had no fixed abode and was wandering about all the time and slept in a bus shelter. He was indicted "that between the 18th and 20th days of February, 1959, at Portsmouth . . . being a person to whom the Schedule applied, [he] resided within the police area of Southsea Police Station, being the appointed police station for the said area, and that [he] unlawfully failed without reasonable excuse to register the address of [his] residence at the police station," contrary to paragraph 2 (1) of the Schedule.

The Recorder directed the jury ". . . he became under an obligation to report as soon as he arrived, with an intention to stay, even if he had not acquired a place of residence. Any place where he spent a night is a place within the meaning of the Act, even if it is only a bus shelter; and it is no answer to say 'I did not have a house to sleep in; I did not have lodgings.'"

R. Brock for the appellant. The direction of the Recorder that a place such as a bench or a bus shelter can be a "place" within the meaning of paragraph 4 (1) of the First Schedule to the Act of 1952 was wrong. Such a place cannot be an "address" in the ordinary recognised sense of the word. The sub-paragraph should be construed as meaning that what is to be deemed thereby to be a residence is a house or other place

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of whatever description which, in the ordinary recognised sense of the word, can be said to have an " address." It would be impossible to register any address of a place such as a bench or a bus shelter. Further, even if this construction of the sub-paragraph is wrong and there was a " place " the address of which the appellant was obliged to register, he had a " reasonable excuse " within the meaning of paragraph 2 for not doing so. The appellant had not been specifically informed of, and could not be expected reasonably to know, his obligation. The prosecution had not proved that on release the Governor of the prison had informed the appellant of his liability under the order, or that the appointed society had used their best endeavours to inform him that they had given the statutory notice to the Commissioner of the Metropolitan Police. The onus was on the prosecution to prove these matters.

On the question of sentence, the sentence passed was one not warranted in law, as six months' imprisonment was the maximum sentence whether the offence was tried summarily or on indictment, and even a sentence of six months was too severe in all the circumstances.

J. Edwards for the Crown. The direction of the Recorder was correct. The word " place " in paragraph 4 (1) is followed by the words " of whatever description " and is, therefore, to be construed in the widest possible sense and not limited in the manner suggested on behalf of the appellant. The limitation of sentence to six months' imprisonment applies only where the offence is tried summarily; when it is tried on indictment, sentence is at large.

THE LORD CHIEF JUSTICE: This appellant was sentenced on September 23, 1957, to eighteen months' imprisonment and an order was made under section 22 of the Criminal Justice Act, 1948. On October 25, 1958, he was released after serving that sentence, and he failed to register with the appointed society. As a result of that the appointed society notified the Commissioner of Police of the Metropolis, and in due course

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in February 1959 he was found at Southsea by the police and was charged with having failed to register his address pursuant to the First Schedule to the Prison Act, 1952. In due course he elected to go for trial before Portsmouth City Quarter Sessions, where he was convicted and sentenced by the learned Recorder to nine months' imprisonment. He now appeals to this court by leave of the court both against his conviction and his sentence.

The case raises an interesting question which, as far as the court knows, has never arisen before, as to the true interpretation of the Prison Act, 1952, and, in particular, the First Schedule to that Act. By section 29 of the Act of 1952 it is provided: "Where an order has been made under section 22 of the Criminal Justice Act, 1948 (which, as amended by this Act, requires a court in certain circumstances to order that a person shall for a period of twelve months be subject to the provisions of this section)—(*a*) the offender shall, on his next discharge from prison and thereafter from time to time, inform the appointed society of his address in accordance with such instructions as may be given to him by or on behalf of the society; (*b*) if the offender fails to comply to the satisfaction of the appointed society with the aforesaid requirement to notify his address on his discharge, the society shall, and if he subsequently fails to keep the society informed of his address to their satisfaction the society may, give notice by registered post of the failure to the Commissioner of Police of the Metropolis, and shall use their best endeavours to inform the offender that the notice has been given; and as from the date on which any such notice has been given as aforesaid, the provisions of the First Schedule to this Act shall apply to the offender." Pausing there, it is provided by paragraph 3 (3) of the First Schedule to that Act: "A certificate purporting to be signed by or on behalf of the Commissioner of Police of the Metropolis and certifying that he has received a notice given pursuant to paragraph (*b*) of subsection (1) of section 29 of this Act to the effect that a person has failed to comply with any requirement under that subsection shall, in any such

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proceedings as aforesaid, be evidence of the notice having been duly given and of the contents of the notice."

In the present case there was such a certificate and, accordingly, there was evidence which was uncontroverted, that not only had the appointed society notified the Commissioner of Police of the Metropolis of a failure by the prisoner to inform the society of his address, but there was also evidence of the contents of the notice, namely, that he had failed to notify his address to the society. Therefore, there is no doubt that he thereupon became subject to the First Schedule.

The First Schedule provides as follows by paragraph 1 (1): "Any person to whom this Schedule applies shall—(*a*) register at an appointed police station in any police area in which he is from time to time residing the address of his residence; (*b*) report once in each month, on such day as may be directed by or on behalf of the chief officer of police, at the police station at which his address for the time being is registered. (2) Where any person to whom this Schedule applies changes his residence, he shall, on registering his new address under this paragraph, state the address which was last registered by him thereunder." Then by paragraph 2 (i) it is provided: "If any person fails without reasonable excuse to comply with any of the requirements of the preceding paragraph, he shall be guilty of an offence and liable on summary conviction thereof to imprisonment for a term not exceeding six months: Provided that: (*a*) in proceedings for a failure to register an address it shall be a defence for the defendant to prove either that—(i) being on a journey to a particular destination he remained no longer in the place in which he failed to register his address than was reasonably necessary for the purposes of that journey; or (ii) his absence from his registered address was temporary and that he kept the officer in charge of the police station at which that address was registered sufficiently informed of his whereabouts." The other provisions do not, I think, matter.

Finally, by paragraph 4 (1), it is provided: "For the purposes of this Schedule, a person shall be deemed to reside

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at any house or other place of whatever description at which he spends a night."

This appellant, there is no doubt, arrived in Portsmouth on February 18. He was arrested on February 20, and the indictment alleged "That between the 18th and 20th days of February, 1959, at Portsmouth, you, being a person to whom the Schedule applied, resided within the police area of Southsea Police Station, being the appointed police station for the said area, and that you unlawfully failed without reasonable excuse to register the address of your residence at the police station." At first he said that he had spent the two nights at the Reception Centre. When he came to give evidence, he denied that and said that he had no fixed abode and that he was wandering about Portsmouth all the time. The learned Recorder told the jury that it mattered not whether he had an address in the ordinary sense of the word, and that it was enough if he had come to Portsmouth other than merely passing through it to get to another destination; in other words, that he had come there to stay, albeit he spent part of the time in a bus shelter or whatever it might be. It is sufficient to refer to page 14 of the summing-up, where he said this: "The first issue of fact for you is 'Did he in fact stay at the reception centre?' He said he did, but now he says that is untrue, that he did not, that he had no place of residence. I have pointed out to you that he became under an obligation to report as soon as he arrived, with an intention to stay, even if he had not acquired a place of residence. Any place where he spent a night is a place within the meaning of the Act, even if it is only a bus shelter; and it is no answer to say 'I did not have a house to sleep in; I did not have lodgings.'"

The first ground of appeal here against conviction is based on that passage in the summing-up. It is said, and said with some force, that a man cannot register the address of a residence if the place where he has resided is a place such as a bench on the promenade or a bus shelter, which is not in the ordinary sense of the word any address. It is true, so the

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argument runs, that paragraph 4 of the First Schedule provides that " a person shall be deemed to reside at any house or other place of whatever description at which he spends a night." Despite those words, so it is said, what is there deemed to be a residence or a residing must be cut down to such house or other place of whatever description which in the ordinary sense of the word can be said to have an address.

As I have said, this is a novel point, and not without difficulty, but the court has come to the conclusion that that argument is wrong. It is to be observed, in the first place, that there is a duty on a man's discharge from prison to inform the appointed society of his address. It would be a very curious result if a man could avoid his obligations under the statute by sleeping rough and saying, in effect, " I have no address." Similarly, in the case of a man who had failed to inform the appointed society of his address and had been reported to the police it would be even more curious if he were able to say: " I do not have to report at the police station; I do not have to register anything at the police station because I have not in the ordinary sense of the word an address at all." Quite clearly the whole object of the Act would be defeated if such argument were to prevail, but, quite apart from that, the court feels that as a matter of construction there is no reason to give that effect to the statute. As I have said, the residence which calls for registration and a monthly report is something which is described by the words " shall be deemed to reside." " A person shall be deemed to reside," that is, to have his residence, " at any house or other place of whatever description at which he spends a night." Observe, therefore, that even one night in such a place brings upon him the obligation to register and that the residence can be any place of whatever description. Wider words could not be imagined, and the whole question is whether there is any justification for cutting down those very wide words by, in effect, inserting words to the effect " provided always that such place has an address." It seems to this court that " address " there both in section 29 of the Act and in the First Schedule is not

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referring to an address in the ordinary sense of the word as a postal address. It denotes something less than that, and the court thinks that the obligation which arises on a deeming to reside in any place of whatever description at which the man spends a night can be fulfilled and should properly be fulfilled by giving a reasonable identification of such a place, not necessarily a postal address, but something which describes or identifies the place with reasonable certainty. Accordingly, the court feels in the present case that the direction by the learned Recorder is unobjectionable. The appellant clearly did spend a night. Observe, the statute does not say " sleeps for a night," but the appellant did spend the night in a place of some description in Portsmouth, and therefore it became his obligation to register, at the appointed police station, a reasonable identification of that place.

The second ground of appeal concerns the phrase in paragraph 2 of the First Schedule, " If any person fails without reasonable excuse to comply with any of the requirements of the preceding paragraph." Here a number of points have been taken by Mr. Brock, but it is sufficient, the court thinks, to deal with only one of them, namely, that he had not been informed and was ignorant of his obligation. It had not been proved by the prosecution, so it is said, that, first of all, the Governor of the prison had given him information as to his liability under the order, and secondly that the appointed society had not used their best endeavours to inform the offender that they had given notice to the Commissioner of Police.

As to the duty of the Governor, it is provided by subsection (2) of section 29: " It shall be the duty of the governor of a prison on the discharge from prison of an offender against whom an order has been made under the said section 22 [of the Criminal Justice Act, 1948] to serve upon him a notice stating the effect of the order." It seems clear upon that provision that it is the duty of the Governor to serve upon a prisoner in such circumstances a notice which not merely says that it is his duty to inform the appointed society of his

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address, but goes on and explains to the prisoner what will happen to him if he fails to give that information and, in particular, that he will then become subject to the First Schedule.

The court finds it unnecessary in this case to consider exactly where the onus of proof lies, though it certainly looks as if it would be for the prisoner in the first instance to put forward what he considers some reasonable excuse, although it may well be that at the end of the day the question will arise whether the prosecution have proved that he failed without reasonable excuse to comply with the requirement. So far as the present case is concerned, it seems perfectly clear that the Governor did give a notice to the prisoner, for the prisoner himself admits that when he was discharged from Preston Prison on October 25 he was told to report to the After-Care Association.

So far as concerns the failure of the appointed society to use their best endeavours to inform him that the notice had been given, it is really difficult in a case such as this to see how the society can do anything in the matter, having taken the steps which they have taken, namely, notifying the Commissioner of Police, for the very reason that the prisoner has not given an address. Therefore there can in the present case, so it seems to the court, be no question of the prisoner being able to say: "I was acting under a reasonable excuse in that I did not appreciate that I was going to make myself liable to the First Schedule." So much for the appeal against conviction.

As regards the appeal against sentence, as I have already said, the learned Recorder sentenced the appellant to nine months' imprisonment, whereas paragraph 2 of the First Schedule provides that a man guilty of this offence shall be "liable on summary conviction thereof to imprisonment for a term not exceeding six months." What, of course, happened in this case was that this offence, which is triable summarily, providing as it does for a maximum sentence in excess of three months, the prisoner was entitled to elect, and did elect, to

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be tried at quarter sessions. It is said by Mr. Edwards, on behalf of the prosecution, that in effect this provision in paragraph 2 of the First Schedule is merely saying that if the trial is a summary trial the maximum sentence is six months whereas, if he elects to be tried at sessions, the punishment is entirely at large. The court cannot accede to that argument. It seems plain that the provision in the Schedule that a prisoner is liable on summary conviction to imprisonment for a term not exceeding six months means that he is so liable on conviction in proceedings initiated in a court of summary jurisdiction. Accordingly, the court feels that in the present case the maximum sentence was a sentence of six months.

Lastly, it is urged by Mr. Brock that in all the circumstances of the case six months would be excessive and there ought to be some further reduction. The court sees no reason to give a sentence in the present case of less than six months, and therefore, while the sentence of nine months cannot stand, the court will substitute a sentence of six months. Accordingly, the appeal against conviction is dismissed; the appeal against sentence is allowed and six months is substituted for nine months.

Appeal against conviction dismissed.
Sentence reduced.

Solicitor: Town Clerk, Portsmouth, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SLADE AND MR. JUSTICE WINN

JOHN CLIFFORD WALTER SAWYER

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Summing-up—Sexual offence—Child—Only Issue that of Identity—Necessity for Warning on Corroboration.

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On a charge of a sexual offence it is essential that the summing-up should contain a warning on corroboration and, if the alleged victim was a child, on the approach to the evidence of children generally on the lines laid down in CAMPBELL (1956) 40 Cr.App.R. 95, at p. 102; [1956] 2 Q.B. 432, at p. 438, even though the fact of the commission of the offence is not disputed and the only issue is one of identity.

Appeal against conviction.

The appellant was convicted at Wiltshire Quarter Sessions on January 7, 1959, of indecent assault on a boy aged nine and was sentenced by the Deputy-Chairman (Sir Armand W. Northey) to five years' preventive detention.

At the trial the defence did not seek to dispute that the offence had been committed by someone, and the only issue was one of identity. The boy alleged to have been assaulted was playing with another boy aged nine on a golf course and was approached by a man who came up on a bicycle. While the other boy went off to look for a pen, the boy who remained was indecently assaulted. Both boys gave evidence on oath and identified the appellant on two occasions as the man who had come up to them. In his summing-up the Deputy-Chairman said: "In view of the way this case has gone . . . I do not think it is necessary to worry you with the questions of law and corroboration in this charge which one has to deal with in normal cases."

J. R. Whitley for the appellant. The summing-up was defective in that it gave no warning on corroboration. Such a warning should always be given irrespective of the question whether the only issue is that of identity or not. [He referred to CAMPBELL (1956) 40 Cr.App.R. 95; [1956] 2 Q.B. 432.]

D. H. W. Vowden for the Crown. It would, no doubt, have been better if the Deputy-Chairman had directed the jury on corroboration, but such a direction is less essential in a case such as this where the fact of the offence having been committed was not in dispute and the only issue was one of identity. The court is asked to consider whether in all the

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circumstances the proviso to section 4 (1) of the Criminal Appeal Act, 1907, should not be applied. The court has applied the proviso even in an ordinary case in the complete absence of any warning on corroboration: GREGG (1932) 24 Cr.App.R. 13.

THE LORD CHIEF JUSTICE: The appellant was convicted at Wiltshire County Sessions of an indecent assault on a nine-year-old boy whom I will call Andrew, and he was sentenced by the Deputy-Chairman to five years' preventive detention. He now appeals against conviction by leave of the court.

The point that the court had in mind in granting leave to appeal was a statement by the Deputy-Chairman in his summing-up that this was a case in which it was unnecessary to give any warning as to corroboration. What happened was that at the close of the evidence the Deputy-Chairman turned to counsel for the prisoner and said: "I take it there is no dispute between you about the assault," and Mr. Whitley, counsel, answered: "No dispute at all." The Deputy-Chairman: "It is merely a question whether he was the man?"

What had happened was that Andrew and another small boy of nine called Michael were playing out on a golf course when, as they said, a man came along on a bicycle, and that while Michael went off to look for a pen, the man indecently assaulted Andrew. Both the small boys on two occasions identified the appellant as the man who had come up. The appellant, on the other hand, maintained that he was not there at all, and he gave accounts of his movements to the police at a very early stage.

Counsel in this case, as we think perfectly properly, was not going to put the small boy through a cross-examination on the acts of indecency. He took up the perfectly proper attitude of saying: "My client's case is that he was not there, and accordingly I am not in a position to dispute that an act of indecency took place. All I am saying is that it was not done by my client." It is true that Mr. Whitley did not put it in exactly those terms, but that is clearly what he intended.

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What he said was that there was no dispute at all with regard to the assault.

That having occurred, the Deputy-Chairman in his summing-up, after referring to the onus of proof, went on thus: "In view of the way this case has gone it is not denied between the parties that an indecent assault was made on the small boy and I do not think it is necessary to worry you with the questions of law and corroboration in this charge which one has to deal with in normal cases. The sole question today is whether this man, Sawyer, was the man who committed this indecent assault on September 17 last."

The court feels that that is wrong, and that in such a case as this the ordinary warning must be given to a jury of the danger of acting on the uncorroborated evidence of the complainant. This is particularly so when the complainant was a child who, true, was sworn, yet in fact was only nine years of age. It is true that there was evidence capable of amounting to corroboration in that the other small boy, Michael, had himself been with Andrew; but even so, in regard to that small boy there ought, in the opinion of the court, to have been at least a general warning given to the jury as to the danger of acting on the evidence of small children, whether the child in question was the complainant or was a child claiming to corroborate the complainant. The matter was put in this way by Lord Goddard in CAMPBELL'S case (1956) 40 Cr.App.R. 95, at p. 102; [1956] 2 Q.B. 432, at p. 438: "The sworn evidence of a child need not, as a matter of law, be corroborated, but a jury should be warned, not that they must find corroboration, but that there is a risk in acting on the uncorroborated evidence of young boys or girls, though they may do so if convinced the witness is telling the truth, and this warning should also be given where a young boy or girl is called to corroborate the evidence either of another child, sworn or unsworn, or of an adult." Accordingly, the court feels that in this case there was a serious omission in the summing-up.

The court has considered whether this is a case in which

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the proviso to section 4 of the Criminal Appeal Act, 1907, should be applied. It is said, and the court accepts it, that these little boys clearly created a very good impression—in fact the jury convicted in five minutes—but here is a case where there was no direction given at all on the danger of acting on the evidence of these small children. It is undoubtedly true that if there is in fact corroboration, the failure to give the warning may not necessarily mean that the conviction must be quashed. There are a number of cases, of which GREGG (1932) 24 Cr.App.R. 13 perhaps is the most striking, where the proviso was applied, although there had been no direction in regard to the uncorroborated evidence of a small child who had not been sworn, in which case corroboration was necessary by statute. All the same, in the present case the court feels that it would be wrong to apply the proviso, there having been no warning given to the jury in regard to the evidence of either Andrew or Michael. Accordingly, this appeal is allowed and the conviction quashed.

Conviction quashed.

Solicitors: Taylor, Jelf & Co., agents for Wilson & Sons, Salisbury, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SLADE AND MR. JUSTICE WINN

CLIFFORD GEORGE WINTLE

1959
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Report of Borstal or Prison Commissioners—Handing to Prisoner—Oral Observation to Accompany—Record on Transcript—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *ss.* 20 (8), 21 (4).

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It is essential that a copy of the report of the Borstal or Prison Commissioners should be handed to the prisoner and the handing should be accompanied by an oral observation to the effect that this is being done. In this way the handing of the copy will be recorded on the transcript.

The proper time for the handing of the copy of the Prison Commissioners' Report is after the notices of previous convictions have been proved.

DICKSON (1950) 34 Cr.App.R. 9 at p. 13; [1950] 1 K.B. 394 approved.

Appeal against sentence.

The appellant pleaded Guilty at Glamorganshire Quarter Sessions on April 13, 1959, to housebreaking and larceny and two charges of larceny and was sentenced by the Chairman to Borstal training.

No counsel appeared.

THE LORD CHIEF JUSTICE: This appellant pleaded guilty at Glamorgan Quarter Sessions to an indictment containing a count for housebreaking and larceny and two counts for larceny. It appears that early this year he got into a house and also into two caravans which had been locked up for the winter and stole rugs, buckets, radio sets, and the like, to the value of about £34. He was sentenced by the Chairman to Borstal training, the theft of a driving licence being taken into consideration, and he now appeals against that sentence by leave of the single judge.

He is a man of over 20 years of age. Ignoring an offence when he was quite young, nine years old, he was in April 1956 placed on probation for two years, having been convicted on three charges of taking a car without the owner's consent, no less than eight similar offences being taken into consideration. It is true the probation period had expired when the present offences were committed, but it had only just expired, and the court cannot in those circumstances conceivably entertain any idea of putting him on probation again.

He complains in his grounds of appeal, amongst other

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things, that he was not shown the Borstal Commissioners' Report, and that, when he saw it, he found that there were mistakes in it. The court is quite unable to check on the accuracy of that, but it does look in this case as if the Borstal Commissioners' Report had never been handed to him. The court is finding over and over again that it is impossible to tell from the transcript in any particular case whether the Prison Commissioners' or the Borstal Commissioners' Report has ever been handed to the prisoner or his counsel: *cf.* sections 21 (4) and 20 (8) of the Criminal Justice Act, 1948. Even when subsequent inquiries are made, it is difficult to find out what happened. The court thinks that the handing of a copy should be a routine matter, and that it should be accompanied by some oral observation, such as: "I now hand you the report," which will appear on the transcript. The proper time for doing this will be after the notices of previous convictions have been proved, and this indeed was stated to be the proper course by the Lord Chief Justice (Lord Goddard) in DICKSON (1950) 34 Cr.App.R. 9, at p. 13; [1950] 1 K.B. 394. In the present case there is nothing in the alleged mis-statements which can affect this case. The court, however, is not satisfied that this is a case for Borstal training. The appellant is said to be an exceedingly good workman when in work, and he is, although under 21, very near the maximum limit for Borstal. The court thinks that the proper course is to set aside the sentence of Borstal training and substitute in its place a period of twelve months' imprisonment. Accordingly, this appeal is allowed and the sentence will be twelve months' imprisonment.

Sentence varied.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BYRNE AND MR. JUSTICE WINN

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ALAN BAINBRIDGE

Accessory before the Fact—Degree of Knowledge Required to be Proved—Knowledge of Type of Crime Intended Essential.

Where a prisoner is charged with being accessory before the fact to felony it is not sufficient to prove that he knew that some crime was intended. It must be proved that he knew that the type of crime which was in fact committed was intended, but it is not necessary to prove that he knew that a particular offence on a particular date and at particular premises was intended.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on December 23, 1958, of being accessory before the fact to office breaking and was sentenced by the Commissioner (Judge Aarvold) to four years' imprisonment.

It was proved that the appellant had purchased oxygen-cutting equipment which had been used in connection with breaking into a bank. His defence was that, although he knew the equipment was to be used for some unlawful purpose, he did not know that it was to be used for the offence which was actually committed and therefore could not be accessory to that offence. The jury were directed: "The knowledge that is required to be proved in the mind of this man is not the knowledge of the precise crime. In other words, it need not be proved he knew the Midland Bank, Stoke Newington branch, was going to be broken into and money stolen from that particular bank, but he must know the type of crime that was in fact committed. In this case it is a breaking and entering of premises and the stealing of property from those premises. It must be proved that he knew that sort of crime

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was intended and was going to be committed. It is not enough to show that he either suspected or knew that some crime was going to be committed, some crime which might have been a breaking and entering or might have been disposing of stolen property or anything of that kind. That is not enough. It must be proved he knew the type of crime which was in fact committed was intended."

Robin Simpson for the appellant.
J. Mervyn Griffith-Jones for the Crown.

THE LORD CHIEF JUSTICE: The appellant was convicted at the Central Criminal Court of being accessory before the fact to office breaking and was sentenced to four years' imprisonment. He now appeals against his conviction only on a point of law.

The facts were these: On the night of October 30, 1958, the Stoke Newington branch of the Midland Bank was broken into by cutting the bars of a window, the doors of the strong room and a safe inside the strong room. Access was obtained by means of oxygen-cutting equipment, and nearly £18,000 was stolen. All the cutting equipment was left behind, and it was later found that cutting equipment of that kind had been purchased by the appellant some six weeks earlier. The case against him was that he had bought this cutting equipment on behalf of one or more of the thieves with the full knowledge that it was going to be used, if not against the Stoke Newington branch of the Midland Bank, at any rate for the purpose of breaking and entering premises.

The appellant's case, as put forward in his evidence, was this: "True, I bought this equipment from two different firms. I had gone there with a man called Shakeshaft to buy it for him. As a result of conversation which I had with him, I was suspicious that he wanted it for something illegal. I thought it was for breaking up stolen goods which Shakeshaft had received, and as the result in those purchases I gave false

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names and addresses, but I had no knowledge that the equipment was going to be used for any such purpose as that for which it was used."

The complaint here is that the judge gave the jury a wrong direction on the matters on which it was necessary for them to be satisfied in order to find the appellant guilty of being an accessory before the fact. [His Lordship cited the passage of the summing-up set out above, and continued:] There are other passages to the same effect, in particular one where the jury returned for further directions before they came to their verdict. The learned judge then said this: "If in fact before it happened he, knowing what is going to happen, with full knowledge that a felony of that kind is going to take place, deliberately and wilfully helps it on his way, he is an accessory. . . . If he was not present, he would not be guilty as a principal, but you would have to decide whether he helped in purchasing this equipment for Shakeshaft, knowing full well the type of offence for which it was going to be used, and, with that knowledge, buying it and helping in that way."

Mr. Simpson, who has argued this case very well, contends that that direction is wrong. As he put it, in order that a man should be convicted of being accessory before the fact, it must be shown that at the time when he bought the equipment in such a case as this he knew that a particular crime was going to be committed, and by a particular crime Mr. Simpson means that the premises which were going to be broken into were known to the appellant and in his contemplation, and also he must have known the date when the crime was going to occur; in other words, he must have known that it was intended on a particular date to break into the Stoke Newington branch of the Midland Bank. The court fully appreciates that it is not enough that it should be shown that the prisoner knew that some illegal venture was intended. To take this case, it would not be enough if the prisoner knew (though he says he only suspected) that the equipment was going to be used to dispose of stolen property. Equally this court is quite satisfied that it is unnecessary that the particular crime which

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was in fact committed should be shown to his knowledge to have been intended, and by " particular crime " I am using the words in the same way in which Mr. Simpson used them, namely, a crime on a particular date and at particular premises.

It is not altogether easy to lay down a precise form of words which will cover every case that can be contemplated, but, having considered the cases and the law, this court is quite clear that the direction of Judge Aarvold in this case cannot be criticised. Indeed, it might well have been made with the passage in Foster's *Crown Cases*, 3rd ed. (1792), at p. 369, in mind, where the learned author says: " If the principal totally and substantially varieth, if being solicited to commit a felony of one kind he wilfully and knowingly committeth a felony of another, he will stand single in that offence, and the person soliciting will not be involved in his guilt. For on his part it was no more than a fruitless ineffectual temptation." The converse, of course, is that, if the principal does not totally and substantially vary the advice or the help and does not wilfully and knowingly commit a different form of felony altogether, the person who has advised or helped, aided or abetted, will be guilty as an accessory before the fact.

Judge Aarvold, in this case, in the passages to which I have referred, makes it clear that there must be not merely suspicion but knowledge that a crime of the type in question was intended, and that the equipment was bought with that in view. In his reference to a felony of the type intended, it was, as he states, the felony of breaking and entering premises and stealing property from those premises. The court can see nothing wrong in that direction.

A second point is taken by Mr. Simpson to this effect, that, even if that direction is valid in law, there was no evidence on which the jury were entitled to convict. As he puts it, there was no evidence more consistent with knowledge that the equipment was needed for a felony of this type than for any other kind of illegal venture. It is enough to say that the court has fully considered the evidence and there was ample

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evidence on which the jury could convict. Accordingly, this appeal is dismissed.

Appeal dismissed.

Solicitors: L. Dawson & Co., for the appellant.

[COURTS-MARTIAL APPEAL COURT]

BEFORE

MR. JUSTICE BYRNE, MR. JUSTICE SLADE AND MR. JUSTICE SALMON

1959
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GERALD MARTIN WILLIAM CADDY

Courts-Martial Appeal Court—Procedure—Notice of Abandonment of Appeal — Withdrawal — Principles Obtaining in Court of Criminal Appeal to be Applied.

Although the Courts-Martial Appeal Court Rules make no provision for the withdrawal of a notice of abandonment of appeal, the court will apply the same principles as obtain in the Court of Criminal Appeal and will not entertain an application for withdrawal unless something amounting to mistake or fraud is alleged which, if established, would enable the court to treat the notice of abandonment as a nullity.

MOORE (1957) 41 Cr.App.R. 179 applied.

Application for leave to withdraw notice of abandonment of appeal.

The applicant was convicted by a district court-martial in Cyprus on November 16, 1958, of three offences of conduct to the prejudice of good order and discipline. He was sentenced to six months' detention and reduction to the ranks. On January 17, 1959, the findings of the court-martial were promulgated, the detention being remitted and the reduction to the ranks being confirmed. On March 14, 1959, the applicant presented a petition, pursuant to section 3 (2) (*a*) of the

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Courts-Martial (Appeals) Act, 1951, praying for the conviction to be quashed. On May 7, 1959, he was notified that the petition had been refused, and on May 16 he applied for leave to appeal against conviction. On June 19 the application was refused by a single judge, and the applicant was notified of this on June 22. Under the Rules he then had a period of ten days in which he might ask that his application be considered by a full court. On June 26 the applicant gave notice of abandonment of appeal and signed the appropriate form in accordance with rule 5 (1) of the Courts-Martial Appeal Rules, 1952 (S.I. 1952, No. 194). On June 29, 1959, he applied for leave to withdraw the notice and to proceed with his appeal, stating that he had had legal advice that it would be unwise to abandon his appeal.

No counsel appeared.

The judgment of the court was delivered by

SLADE J. (after stating the facts): The court is treating this application as an application for leave to withdraw the notice of abandonment of appeal. Although the Criminal Appeal Act, 1907, and the Courts-Martial (Appeal) Act, 1951, and the Rules made under the respective Acts deal with the abandonment of an appeal, neither the Acts nor the Rules contain any reference to withdrawals of notice of abandonment. [After reading rules 4 (1) and (2), 5 (1), 9 (2), 11 (3) and 21 of the Courts-Martial Appeal Rules, 1952, his Lordship continued:] The practice in the Court of Criminal Appeal in regard to applications for leave to withdraw a notice of abandonment was laid down in MOORE (1957) 41 Cr.App.R. 179. There (at p. 180) the Lord Chief Justice (Lord Goddard) referred to rule 23 of the Criminal Appeal Rules, 1908, which provides that on a notice of abandonment being given the appeal shall be deemed to have been dismissed, and said: "Accordingly, the court is not going to entertain applications for the withdrawal of notices of abandonment unless, as I say, something amounting to fraud or mistake is alleged, which,

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if established, would enable the court to say that the notice of abandonment should be regarded as a nullity." Two other cases where a similar practice had been laid down were referred to: VAN DYN (1932) 23 Cr.App.R. 150 and PITMAN (1916) 12 Cr.App.R. 14.

The only substantial difference between an application of this nature to the Court of Criminal Appeal and an application to this court is that in the Courts-Martial Appeal Rules, 1952, there is no provision corresponding to rule 23 of the Criminal Appeal Rules, 1908; but that does not seem to warrant any alteration of the practice, because the grounds on which, in exceptional circumstances, the Court of Criminal Appeal will allow a notice to be withdrawn are based on circumstances which will enable the court to treat the notice of abandonment as itself a nullity, so that no question would then arise of the appeal being deemed to have been dismissed. The only other circumstance of difference in the present case is that the attempt to reinstate the application for leave to appeal was within the ten days prescribed by rule 8 (3) of the Courts-Martial Appeal Rules, 1952. The court sees no ground whatever for differentiating the procedure in the Courts-Martial Appeal Court from the similar procedure in the Court of Criminal Appeal. No circumstance even approaching the exceptional circumstances in which an appeal would be considered on the grounds that the notice of abandonment should be treated as a nullity is shown in this case and the application is, accordingly, refused.

Application refused.

BEFORE

MR. JUSTICE HILBERY, MR. JUSTICE HAVERS AND MR. JUSTICE THESIGER

BERNARD HUGH WALDEN

1959
July 27, 30

Summing-up—Murder—Diminished Responsibility—Right of Judge to Point out to Jury Matters to be Looked for in Deciding Issue—Homicide Act, 1957 (*5 & 6 Eliz. 2, c.* 11), *s.* 2 (1).

Where the defence of diminished responsibility is raised on a charge of murder, it is a sufficient direction if the judge draws the attention of the jury to the exact terms of section 2 (1) of the Homicide Act, 1957, but he may, if he thinks proper, point out to the jury the sort of things which they can look for in order to decide whether on the facts the case comes within the subsection. A direction to the effect: "It may be that the defendant is not insane, but he is on the border-line and not fully responsible for what he has done. You may think that is what is meant by the words of the Act 'such abnormality . . . as substantially impairs his mental responsibility.' In other words, he is not really responsible for what he is doing. His responsibility, if not wholly gone, has been impaired" is perfectly proper.

H.M. ADVOCATE *v.* BRAITHWAITE, 1945 S.C.(J.) 55 followed.
SPRIGGS, 42 Cr.App.R. 69; [1958] 1 Q.B. 270 explained.

Appeal against conviction.

The appellant was convicted at Sheffield Assizes on July 1, 1959, of capital murder and was sentenced by Paull J. to death.

At the trial the defence was that of diminished responsibility. The material portions of the summing-up appear in the judgment, as do the material facts.

H. C. Scott (*J. F. S. Cobb* with him) for the appellant. The substantial ground of appeal is that the judge misdirected the jury by attempting to redefine what section 2 (1) of the Homicide Act, 1957, had already defined. The judge tried to tell the jury what he thought the subsection really meant, though that was a matter entirely for the jury. He told the

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jury that they might think that Parliament meant that something bordering on insanity had to be established, but it was dangerous to talk in terms of insanity. The judge should merely have read the exact terms of the subsection to the jury and left them to decide its meaning. That was the principle laid down by this court in SPRIGGS, 42 Cr.App.R. 69; [1958] 1 Q.B. 270.

G. S. Waller, Q.C., and *J. B. Willis* for the Crown were not called on to argue.

Cur. adv. vult.

July 30. The judgment of the court was read by

HILBERY J.: This application by Bernard Hugh Walden for leave to appeal against his conviction for two capital murders was dismissed by us and we now give our reasons.

The applicant was convicted at Sheffield Assizes of the capital murder of Joyce Moran by shooting and of the capital murder of Neil Saxton by shooting. The applicant, aged 33 and a well-educated man, was an assistant lecturer at Rotherham Technical College. He had proposed marriage to Joyce Moran, a girl of 21, employed in the office at the college, who had declined his proposal, and favoured a student at the college of the same age as herself, Neil Saxton.

A week or so later the applicant left a class which he was taking and passed in the corridor on his way to his locker Neil Saxton, who was talking to Joyce Moran through a window. Returning from his locker, he shot Neil Saxton through the back and then went into the office and shot Joyce Moran through the back six times, the last three shots being fired into her back as she lay on the ground. Neil Saxton and Joyce Moran died from gunshot wounds. The applicant then ran off to his car, which he later abandoned at Leeds with the pistol which he had used and some spare cartridges. He was found three weeks later by a police constable in a shelter at Reading. The evidence that the applicant had shot and killed Joyce Moran and Neil Saxton was overwhelming, and indeed was not disputed by the defence.

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At the trial, evidence was adduced for the defence with a view to proving that the applicant was suffering from such abnormality of mind as substantially impaired his mental responsibility for his acts in doing the killing within the meaning of section 2 (1) of the Homicide Act, 1957. Dr. Valentine, a consultant psychiatrist, was of opinion that the applicant was suffering from a severe abnormal type of personality and had a chronic paranoid development, and that he was grossly abnormal so that his mental responsibility for his acts was substantially impaired. For the prosecution, Dr. Walker, the senior medical officer of the prison, who had the applicant under observation from the time of his arrest until the trial, could not detect any signs of chronic paranoid development or any signs of mental disorder or defect and was of the opinion that the applicant was not suffering from any abnormality of mind. Dr. Fraser, a consultant psychiatrist, was of the opinion that the applicant was not suffering from any abnormality of mind and that all his reactions were within the limits of normality.

It was, therefore, for the jury to decide upon the evidence whether the applicant had proved upon balance of probability that he was suffering from such abnormality of mind as substantially impaired his mental responsibility for his acts. The jury convicted the applicant of capital murder upon each count.

The applicant sought leave to appeal against his conviction upon the ground that the trial judge had misdirected the jury in that (1) the judge attempted to define or redefine what Parliament had already defined in section 2 (1) of the Homicide Act, 1957; (2) the judge was not entitled to do more than call the attention of the jury to the exact words of the section and leave them to say whether upon the evidence they were satisfied that the case came within the section, and accordingly, if the judge said anything whatever to the jury by way of explanation or illustration (as he did), it was a misdirection. It was contended that the decision of the Court of Criminal Appeal in SPRIGGS, 42 Cr.App.R. 69; [1958] 1 Q.B. 270, established

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these two propositions; (3) the judge gave an incorrect definition of and misconstrued the words contained in the said section in that he construed the words as amounting to " Poor fellow, he is not insane, but not far from it; his mental condition is one which is bordering upon, but not amounting to, insanity "; (4) the judge directed the jury that if they disagreed with his construction of the subsection, they could ignore it.

It is to be observed that in section 2 (1) of the Homicide Act, 1957, Parliament has set out the matters of fact which must collectively be proved in order to establish a plea of diminished responsibility. It has not, however, defined in the section or elsewhere " abnormality of mind " or " mental responsibility " or indeed any of the other expressions used in the section. Indeed, the expression " such abnormality of mind . . . as substantially impaired his mental responsibility " connotes a question of degree and questions of degree are questions of fact in each case.

In our opinion, the decision of this court in SPRIGGS (*supra*) must be examined in the light of the argument addressed to the court. In that case it was contended that the judge did not give a sufficient direction as to the meaning of the expression " abnormality of mind " or " mental responsibility " and did not distinguish to the jury between emotional instability or gross personality disorder and so forth. In that case the judge had prepared and handed to the jury the terms of the section so that they could see it and had told the jury that it was for them to decide whether or not the appellant suffered from such an abnormality of mind as substantially to impair his responsibility, and had reviewed the evidence given on one side and the other.

By its judgment this court rejected the contention of the appellant that there was any duty upon the trial judge to define or redefine " abnormality of mind " or " mental responsibility " and held that it was a sufficient direction if the trial judge drew the attention of the jury to the exact terms of the section and told them that it contained the test

which they were to apply and left it to them to decide whether on the evidence the case came within the section or not. We are of opinion that this is all that SPRIGGS (*supra*) decided. It did not (in our view) decide that the judge was not entitled, in order to assist the jury upon the facts of the case before them, to point out to them by way of illustration or explanation the sort of thing which they could look for to see if the case came within the section. Indeed, in SPRIGGS (*supra*) Lord Goddard, the Lord Chief Justice, in giving the judgment of the court, referred to the direction given by Lord Cooper in H.M. ADVOCATE *v.* BRAITHWAITE, 1945 S.C.(J.) 55 as to the sort of things which the jury would have to look for.

SPRIGGS (*supra*) does not establish either of the two propositions raised by Mr. Scott, and, though it is a sufficient direction if the judge draws the attention of the jury to the exact terms of the section, it is not, in our view, a misdirection if he points out to the jury the sort of things which they could look for in order to decide whether upon the facts the case comes within the section. Moreover, SPRIGGS (*supra*) certainly did not decide that the course taken by the judges in Scotland to which we have referred would be inappropriate for use by an English judge when directing a jury upon this section.

The trial judge in this case before us, as in SPRIGGS (*supra*), had prepared and handed to the jury a copy of the section. He directed them that it was for them to say whether upon the evidence the applicant had brought himself within the section. In the course of his summing-up the judge, after referring to the definition of insanity in the M'NAGHTEN CASE (1843) 10 Cl. & F. 207, said: "There are some cases you may think where a man has nearly got to that condition but not quite; where he is wandering on the border-line between being sane and insane where you can say to yourself, 'Well, really, it may be he is not insane, but he is on the border-line, poor fellow. He is not fully responsible for what he has done.' Now you may think, and it is entirely a matter for you, that that is what is meant by these words in the Act of Parliament, 'such abnormality . . . as substantially impairs his mental

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responsibility.' In other words, he is not really responsible for what he is doing. His responsibility, if not wholly gone, has been impaired." These words closely approximate to the passage from the direction given by Lord Cooper in H.M. ADVOCATE *v.* BRAITHWAITE (*supra*) cited by Lord Goddard C.J. in SPRIGGS (*supra*).

In our view, in this passage from the summing-up the judge was only giving an illustration of the sort of thing which the jury might consider in deciding whether upon the facts the case came within the section and was not a misdirection by the judge. We think that the judge was right in directing the jury as he did that it was a question for them and not for him whether upon the facts they found that the applicant brought himself within the section or not.

A further ground of appeal was that the judge failed properly to remind the jury of the evidence of Dr. Valentine, or to give any explanation of its effect. We are satisfied that there is no foundation for this complaint and that the judge gave an adequate review of the substance of the evidence of Dr. Valentine and sufficient explanation of its effect.

Appeal dismissed.

BEFORE

MR. JUSTICE GORMAN, MR. JUSTICE PAULL AND MR. JUSTICE ELWES

1959
Aug. 18

OWEN MORRIS

Character of Prisoner—Cross-Examination on Previous Conviction —Imputation on Character of Crown Witness—Discretion of Judge—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1 (*f*) (ii).

The appellant was charged with sexual intercourse with his stepdaughter, aged 11. Questions were put in cross-examination to the girl on her having stolen from school, having had

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intercourse with a boy, being in the habit of keeping bad company and coming home late at night, and to the girl's mother on having been found in the act of intercourse with a man not her husband. When the appellant gave evidence, counsel for the Crown obtained leave from the judge to cross-examine the appellant on a previous conviction for dishonesty, on the ground that the nature or conduct of the defence was such as to involve imputations on the character of Crown witnesses within the meaning of section 1 (*f*) (ii) of the Criminal Evidence Act, 1898.

Held, that as the general line adopted by the defence was to make suggestions to discredit the girl and her mother, there had been imputations on the character of Crown witnesses within the meaning of the section and the judge had rightly exercised his discretion in permitting cross-examination of the appellant on the previous conviction.

Observations on the necessity for a warning being given to a prisoner who is embarking on a line of cross-examination which may let in evidence of previous convictions.

COOK (*ante*, p. 138) followed.

Appeal against conviction.

The appellant was convicted at Liverpool Crown Court on April 10, 1959, of sexual intercourse with his stepdaughter, aged 11, and was sentenced by Pearson J. to five years' imprisonment.

When the stepdaughter gave evidence, questions were put to her in cross-examination by defending counsel suggesting that she had been stealing from school, had had intercourse with a boy, kept bad company and came home late at night, and it was suggested to the girl's mother that she had been found in the act of intercourse with a man not her husband. The appellant gave evidence on his own behalf and counsel for the Crown obtained leave from the judge to cross-examine him on a previous conviction for dishonesty, which the appellant admitted.

Gerard Wright for the appellant. So far as the appellant's wife was concerned the suggestion made to her with regard to immorality was quite incidental, and not part of the defence put forward by the appellant. If, however, the conduct of the defence did bring the case within the proviso to section 1

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(*f*) (ii) of the Criminal Evidence Act, 1898, it still remained within the discretion of the judge whether he should permit the appellant to be cross-examined as to his character: STIRLAND *v.* D. P. P., 30 Cr.App.R. 40; [1944] A.C. 315, at p. 324; JENKINS (1945) 31 Cr.App.R. 1, at p. 14; and COOK, *ante*, p. 138; [1959] 2 W.L.R. 616. In this case the trial judge was never able to exercise his discretion because counsel for the prosecution (not counsel now appearing) asked a question as to character and received an answer from the appellant before objection could be made and before the judge could exercise his discretion. The judge did then say that in his discretion he permitted the questions, but at that stage it was not his own discretion, for this had already been exercised for him.

[ELWES J.: I feel that in this case the judge's hand was forced by counsel for the prosecution.]

[He referred also to TURNER, 30 Cr.App.R. 9; [1944] K.B. 463; PRESTON, 2 Cr.App.R. 24; [1909] 1 K.B. 568; and BRIDGWATER [1905] 1 K.B. 131.]

W. Guthrie Jones for the Crown. The attack here was on the credit and not on the evidence of the Crown witnesses, and the case clearly fell within the proviso to section 1 (*f*) (ii) of the Act of 1898. [He referred to JENKINS (*ante*) and COOK (*ante*).] Although counsel who appeared for the prosecution at the trial appears to have been somewhat precipitate with his cross-examination, the judge did clearly exercise his discretion in allowing this line of cross-examination and exercised it properly.

GORMAN J.: The appellant, Owen Morris, was convicted at the Liverpool Crown Court of having had sexual intercourse with a child of 11, she being his stepdaughter, and he was sentenced to five years' imprisonment. There is no appeal against sentence, but there is an appeal against the conviction.

The short ground of appeal is that Pearson J. allowed to be put to the appellant questions with regard to a previous conviction for dishonesty. The court is very much indebted

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to Mr. Wright for the care with which he has put this case before the court.

The provisions of the Criminal Evidence Act, 1898, which are relevant are these: "1. . . . (*f*) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character." There is an exception (ii) where "he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establishing his own good character," and then that which is relevant to this case, "or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution."

In this case questions were put to the wife of the appellant and to the girl. So far as the girl is concerned, questions were put as to her having stolen from school, as to having had intercourse with a boy next door, as to her being in the habit of keeping bad company, and as to her being home late at night. The suggestion was made to the wife that she had been found on the bedroom floor with a man.

We have very carefully considered this case, and it seems to this court to be clear that the general line adopted by the defence was to make suggestions to discredit the girl and her mother by suggesting that the girl was thieving and tending to immorality, and that her mother was immoral. We are unable to take the view put forward by Mr. Wright that the suggestion made to the wife was something quite incidental to and not part of the defence put forward by the appellant. It is quite plain not only that the learned judge did exercise his discretion, but also that he in fact exercised it in the correct way, and that the questions put to the appellant with regard to his previous conviction were questions which by law it was permissible to ask.

Before leaving this case the court desires me to call attention to what was said by this court in COOK, *ante*, at p. 147, in

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[1959] 2 W.L.R. 616, at p. 622, which appears in the judgment of the court, given by Devlin J.: "In cases of this sort, where there is no hard and fast rule, some warning to the defence that it is going too far is of great importance; and it has always been the practice for prosecuting counsel to indicate in advance that he is going to claim his rights under the subsection, or for the judge to give the defence a caution. This is especially needful when the prisoner, as here, was not represented, though it is fair to say that he professed familiarity with the law and rejected the legal aid that had been assigned to him."

That is referred to in order that those who have not read the report may read it, and may regard it in the future.

This appeal is dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ASHWORTH AND MR. JUSTICE HINCHCLIFFE

1959
Oct. 2, 3

ANTHONY HOGARTH THOMAS

Further Evidence — Evidence Relating to Matters Arising since Conviction.

Summing-up — Corroboration — Matters Wrongly Referred to as Capable of Constituting Corroboration—Conviction Quashed.

Where a convicted person desires to rely on fresh evidence relating to matters which have occurred since his conviction, *semble*, his proper course is to lodge a petition with the Home Secretary so that, if thought fit, action may be taken in accordance with the provisions of section 19 of the Criminal Appeal Act, 1907.

ROBINSON (1917) 12 Cr.App.R. 226; [1917] 2 K.B. 108 not followed.

Conviction quashed where the jury had been invited to regard matters as capable of constituting corroboration which could not properly be so regarded.

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ANTHONY HOGARTH THOMAS

Parker L.C.J., Ashworth J., Hinchcliffe J.

Appeal against conviction.

The appellant was convicted at Dorset Assizes on January 24, 1959, of child stealing, abduction and indecent assault on a girl of 13, and was sentenced by Cassels J. to eighteen months' imprisonment.

The following statement of facts is taken, in substance, from the judgment. The incidents out of which the charges arose occurred on a Saturday night, November 22, 1958. In substance the case against the appellant was that at about 9 o'clock that evening he was driving his car along a road in the Wheatley Road area of Bournemouth when he came upon a girl walking home after carrying out an errand for her mother. It was undisputed that the appellant was, at that time, seeking to find the address of a prospective purchaser for a television set, and that he had been misdirected. He pulled up alongside the girl and asked her where the road which he was seeking was, and, when she said she knew, he on his own admission invited her to get into the car and show him the way. The episode ended at about 5 o'clock the following morning when the appellant and the girl were found some eight miles away asleep in the car. At that time the girl had her knickers in her lap. The girl's evidence was that she had herself removed them when relieving herself and had not put them on again.

What happened during the interval was a matter of controversy. According to the girl she was the subject of a revolting indecent assault on at least two occasions and possibly more. She did not suggest that at any time the appellant exposed his person or made use of it. The evidence was conflicting and the girl's own story contained manifest discrepancies. It was common ground that the car had stopped more than once because the battery needed charging, and that they obtained assistance in restarting it, and that on the second occasion the girl and the appellant strove for some hours to restart the car by pushing it up a slope. Eventually, according to the appellant, his attempt to drive the girl home was abandoned and he thought it better to wait

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until morning where they were. There they were found by the police. An empty whisky bottle which smelt of whisky was found in the car.

The judge indicated in his summing-up that the removal of the girl's knickers and the presence of the bottle of whisky in the car were capable of constituting corroboration of her evidence.

N. Blaker for the appellant.
Raymond Stock for the Crown.

The appeal came on for hearing on October 2, 1959, and the court then heard further evidence *de bene esse* of three neighbours of the girl, who stated that after the trial the girl had told them that the evidence which she had given at the trial was in some respects untrue.

At the conclusion of the hearing the court intimated that the appeal would be allowed and that reasons for their decision would be given later.

Cur. adv. vult.

October 5. The judgment of the court was delivered by

ASHWORTH J.: This appellant was convicted at Dorset Assizes in January last upon an indictment containing three counts, one for child stealing, one for abduction, and one for indecent assault, the victim in each case being a girl aged 13 named Osborne.

[His Lordship stated the facts as set out above and continued:] It was, on any view, an unusual and, in some respects, a discreditable story so far as the appellant was concerned, but from first to last he stoutly maintained that at no time had he been guilty of any indecency towards the girl nor had he intended to remove her from her home. He was convicted on all three counts and sent to prison for eighteen months concurrent on each. By leave of this court he has

appealed, and the appeal was heard on Friday last, when we intimated that it would be allowed and that the reasons would be given today.

The two main grounds on which the appellant relied were as follows: First, he applied for leave to call additional evidence which, if accepted, would establish (*inter alia*) that the evidence given by the girl at the trial was false and had been admitted by her to be false. Secondly, it was contended that the jury had wrongly been invited to consider as possible corroboration matters which could not properly be so regarded. Those two grounds are quite distinct and it is convenient to deal with them separately.

We deal first with the question of additional evidence. It became clear at an early stage of the hearing before us that part of this evidence related to matters which were said to have occurred after the appellant's conviction and sentence; such evidence could not, therefore, have been laid before the jury at the appellant's trial. On the other hand, the other part of the proposed evidence related to matters which were said to have occurred before the appellant's trial. So far as the latter part of the proposed evidence was concerned, no procedural difficulty arose: section 9 of the Criminal Appeal Act, 1907, expressly provides for the reception of such evidence. But in regard to evidence relating to matters which have occurred since an appellant's conviction the Act contains no express provision and notwithstanding the decision in ROBINSON (1917) 12 Cr.App.R. 226; [1917] 2 K.B. 108, we are inclined to think that when a convicted person desires to rely upon such evidence, his proper course is to lodge a petition with the Home Secretary, so that, if thought fit, action may be taken in accordance with the provisions of section 19 of the Act. In the present case we decided to hear the evidence *de bene esse* and to postpone any ruling as to the court's power or discretion to receive it. Having heard the evidence, we were of opinion that it was not of sufficient weight or reliability to be acceptable and that, in so far as it could have been laid before the jury at the appellant's trial, it would not have

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affected their conclusion. Accordingly, it is unnecessary to express any further opinion as to the circumstances in which this court either can or should receive evidence of events occurring after a conviction.

The second main ground relied on by the appellant related to the question of corroboration. The case was clearly one in which the jury should be warned of the danger of acting on the girl's evidence unless it was corroborated in some material particular, and the requisite warning was duly given in general terms early in the summing-up. At that stage the jury's attention was not directed to any specific matters, but at a later stage two matters were mentioned as constituting possible corroboration, namely, the bottle of whisky and the girl's knickers. We do not think it necessary to deal with either of these matters in any detail. It is sufficient to say that in our view the whisky bottle was not capable of constituting corroboration in respect of any of the three charges on which the appellant was tried, and, in regard to the knickers, the girl's own explanation of the way in which she came to take them off negatived any indecency on the part of the appellant at that stage of the proceedings. It follows, therefore, that the jury were invited to regard two matters as capable of constituting corroboration which could not properly be so regarded. This court has had occasion to consider this type of problem on many occasions in the past and the decided cases show that in such circumstances the conviction will as a rule be quashed, unless the proviso to subsection (1) of section 4 of the Criminal Appeal Act, 1907, is held to be applicable: see, for example, COULTHREAD (1933) 24 Cr.App.R. 44. In the present case counsel for the Crown urged that, quite apart from the whisky bottle and the knickers, there were other matters which might have been relied on as constituting corroboration, and that we should therefore apply the proviso. We did not think it right to do so. The evidence given at the trial showed that there were several unusual features in the case and a careful study of that evidence aroused in the mind of the court serious misgivings as to the appellant's guilt.

In the result, therefore, the appeal must be allowed and the conviction quashed.

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Conviction quashed.

Parker L.C.J., Ashworth J., Hinchcliffe J.

Solicitors: Sharpe, Pritchard & Co., for C. P. Brutton, Dorchester, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ASHWORTH AND MR. JUSTICE EDMUND DAVIES

NORMAN DAVIS

1959
Oct. 19

Summing-up — Silence of Prisoner when Arrested — Cautioned — Adverse Comment—Conviction Quashed.

Where a comment in a summing-up on the prisoner's silence when arrested and cautioned by the police amounts to an invitation to the jury to form an adverse view of the prisoner from the fact of his silence, such comment amounts to a misdirection.

Conviction quashed on this ground.

NAYLOR, 23 Cr.App.R. 177; [1933] 1 K.B. 685 followed.

GERARD (1948) 32 Cr.App.R. 132 distinguished.

Appeal against conviction.

The appellant was convicted at Hertfordshire Quarter Sessions on January 26, 1959, of storebreaking and larceny and was sentenced by the deputy-chairman (Edward Clarke, Esq.) to Borstal training.

In the course of his summing-up the deputy-chairman said: "Members of the jury, let us see for a moment what Davis said when he was arrested. He was told that the police had reason to believe he was concerned in stealing. . . . He was then cautioned that he was not obliged to say anything unless he wanted to, but that anything he did say would be taken

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down and might be given in evidence, and he said 'I am saying nothing.' Members of the jury, a man is not obliged to say anything, but you are entitled to use your common sense. If Davis was in the position that he now would have you believe he was in . . . would he say to the police 'I am saying nothing'? . . . Can you imagine an innocent man who had behaved like that not saying something to the police in the course of the evening or the next day, or even a little time afterwards? He said nothing."

Patricia Coles for the appellant. The comments made by the deputy-chairman on the appellant's silence after being cautioned amounted to a misdirection. The jury were being invited to form a view adverse to the appellant for that reason. In NAYLOR, 23 Cr.App.R. 177; [1933] 1 K.B. 685, and LECKEY, 29 Cr.App.R. 128; [1944] K.B. 80, convictions were quashed by this court by reason of similar comments having been made in the summing-up.

E. A. Machin for the Crown. The comments were certainly unfortunate, but not every comment of this kind in a summing-up is a ground for quashing a conviction. [He referred to TUNE (1944) 29 Cr.App.R. 162 and GERARD (1948) 32 Cr.App. R. 132.]

THE LORD CHIEF JUSTICE: This appellant was convicted together with another man called Hemmings at Hertfordshire Quarter Sessions of storebreaking and larceny, and he was sentenced to Borstal training. He now appeals against that conviction.

The short facts were these: Between about 5.15 and 10.40 in the evening of December 11, 1958, thieves broke a padlock off a shed and stole a quantity of tinned goods. At 10.40 that same evening the appellant and Hemmings were found carrying these groceries from a van which belonged to Hemmings into a flat where the appellant was lodging. The appellant was caught and Hemmings jumped out of a window and got away. His defence, as we understand it, was that he had lent his van

to a man named Goss and that Goss had brought these tinned goods to his, the appellant's, flat, and the appellant was assisting by hiding them away.

The first ground of appeal here is that the learned deputy-chairman misdirected the jury in the way in which he commented on the answers which the appellant gave to the police when he was cautioned. There are two passages in the summing-up. In the first one the deputy-chairman says this: "Members of the jury, let us see for a moment what Davis said when he was arrested. He was told that the police had reason to believe that he was concerned in stealing a quantity of property, the property found in the house. He was then cautioned that he was not obliged to say anything unless he wanted to but that anything he did say would be taken down and might be given in evidence, and he said: 'I am saying nothing.' Members of the jury, a man is not obliged to say anything, but you are entitled to use your common sense. If Davis was in the position that he now would have you believe he was in, having handled a lot of stolen property, which he did on the authority of Goss, would he say to the police: 'I am saying nothing'?" It is true that the deputy-chairman then said: "Do not be too hard on him because of what his first reaction is, but it goes on." Later the deputy-chairman said this: "When he was charged and cautioned, he made no reply. Members of the jury, that was on December 12, and I direct you that you can take this into consideration as a matter of common sense. It is perfectly true that Davis is not obliged to say anything unless he wants to, but suppose for a moment that the story that Davis gave was the true one —that he had been handling this property on behalf of somebody called Goss, which had come out of Hemmings' van a little time before. Can you imagine an innocent man who had behaved like that not saying something to the police about this in the course of the evening or the next day, or even a little time afterwards? He said nothing."

As was said by Humphreys J. in GERARD (1948) 32 Cr.

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App.R. 132, at p. 134: "Counsel for the applicant has submitted to this court that that comment was a misdirection. It could be a misdirection only if it was an invitation to the jury to form an adverse opinion against the applicant because he did not then give an explanation, but, in our opinion, it cannot possibly be construed as anything of the sort."

We have been referred to a number of cases, some of which fall on one side of the line and some on the other, but here in this case the court feels that undoubtedly this was making a comment about the prisoner which was inconsistent with his innocence. The expression "Can you imagine an innocent man doing this?" is not a mere comment on the fact that perhaps it was unfortunate he did not give an answer, but is really saying "Do you as a jury of people of common sense really think that a man can be innocent if he makes no reply in those circumstances?"

The court feels that this case is most like that of NAYLOR, 23 Cr.App.R. 177; [1933] 1 K.B. 685, where the accused had said: "I don't wish to say anything except that I am innocent." In referring to those words the recorder in his summing-up continued as follows (23 Cr.App.R. at p. 180; [1933] 1 K.B. at p. 686): "Now you would imagine a purely innocent young man accused of housebreaking and having these words put to him, 'Do you wish to say anything?' surely if he is an innocent man one would think he would give some explanation of where he was, and what he was doing at the particular time." The court in those circumstances quashed the conviction. They said this: "Now if those words are really to be construed in this sense, that, having heard them, an accused person remains silent at his peril and may find it a strong point against him at his trial that he did not say anything after being told he was not obliged to say anything, one can only think that this form of words is most unfortunate and misleading. We think that these words mean what they say and that an accused person is quite entitled to say 'I do not wish to say anything except that I am innocent.'"

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The court feels that in these circumstances, unfortunate as it is, this conviction cannot stand and must be quashed.

Conviction quashed.

PRACTICE NOTE

STATEMENT ON COSTS IN CRIMINAL CASES

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At the sitting of the Court of Criminal Appeal (the Lord Chief Justice, Ashworth and Edmund Davies JJ.) the following statement was made by—

THE LORD CHIEF JUSTICE: The court desires to make a statement on costs in criminal cases.

The court's attention has been drawn to the difficult question as to the lines on which the discretion to award costs to an acquitted person should be exercised. This discretion, so far as courts of assize and quarter sessions are concerned, is now given by section 1 (1) of the Costs in Criminal Cases Act, 1952, under which the court "may, if the accused is acquitted, order the payment out of local funds of the costs of the defence." The discretion is in terms completely unfettered, and there is no presumption one way or the other as to the manner of its exercise.

In a statement issued on March 24, 1952 (36 Cr.App.R. 13), this court, while emphasising that every case should be considered on its merits, said that it was only in exceptional cases that costs should be awarded. That statement referred to a circular issued by the Lord Chief Justice (Lord Goddard), after consultation with the judges of the Queen's Bench Division, approving a Home Office circular issued in connection with section 44 of the Criminal Justice Act, 1948, now replaced by the section referred to above. While no attempt was there made to catalogue the exceptional cases in which costs might be awarded, such illustrations as were given were cases where

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PRACTICE NOTE (STATEMENT ON COSTS IN CRIMINAL CASES)

Parker L.C.J., Ashworth J., Edmund Davies J.

the prosecution could be said to be in some way at fault. On the other hand a suggestion has been canvassed that the mere fact of an acquittal should carry with it the expectation that the discretion would be exercised in favour of the acquitted person. Were either of these views correct, the effect would be to impose a fetter upon the exercise of the absolute discretion conferred by the statute. As we have said, there is no presumption one way or the other as to its exercise. Each case must be considered on its own facts as a whole and costs may and should be awarded in all cases where the court thinks it right to do so. It is impossible to catalogue all the factors which should be weighed. Clearly, however, matters such as whether the prosecution have acted unreasonably in starting or continuing proceedings and whether the accused by his conduct has in effect brought the proceedings, or their continuation, upon himself are among the matters to be taken into consideration. On the other hand the court desires to make it plain that they entirely dissociate themselves from the view that the judge is entitled to base his refusal to award costs on the ground that he thinks that the verdict of the jury was perverse or unduly benevolent. The mere fact that the judge disagrees with the verdict of the jury is no more a ground for refusing to award costs to the acquitted person than the mere fact of his acquittal is a ground for awarding them.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY, MR. JUSTICE DONOVAN, MR. JUSTICE ASHWORTH AND MR. JUSTICE PAULL

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GUENTHER FRITZ ERWIN PODOLA

Jurisdiction of Court—Appeal against Conviction—Ground of Error in Law in Hearing of Preliminary Issue.

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GUENTHER FRITZ ERWIN PODOLA

Parker L.C.J., Hilbery J., Donovan J., Ashworth J., Paull J.

Fitness to Plead — Burden of Proof — "Insane" — Hysterical Amnesia—Criminal Lunatics Act, 1800 (39 & 40 *Geo.* 3, *c.* 94), *s.* 2.

If a convicted person appeals against his conviction on the ground that the hearing of a preliminary issue with regard to fitness to plead was open to objection of error in law, so that he should not have been tried on the substantive charge at all, the court has jurisdiction to entertain the appeal.

CRANE *v.* D. P. P., 15 Cr.App.R. 183; [1921] 2 A.C. 299 applied.

JEFFERSON (1908) 1 Cr.App.R. 95 and CABORN-WATERFIELD, 40 Cr.App.R. 110; [1956] 2 Q.B. 385 referred to.

In all cases in which a preliminary issue with regard to accused person's fitness to plead is raised, whether that issue is contested or not, the jury should be directed to consider the whole of the evidence and to answer the question: "Are you satisfied upon the evidence that the accused person is insane so that he cannot be tried upon the indictment?" If the contention that the accused is insane is put forward by the defence and contested by the prosecution, there is a burden on the defence of satisfying the jury of the accused's insanity. That burden is discharged if the jury are satisfied on the balance of probabilities that insanity has been made out. Conversely, if the prosecution alleges and the defence disputes insanity, there is a burden on the prosecution of establishing it.

DYSON (1831) 7 C. & P. 305 n.; PRITCHARD (1836) 7 C. & P. 303; TURTON (1854) 6 Cox 385; RIVETT (1950) 34 Cr.App. R. 87 and RUSSELL *v.* H.M. ADVOCATE, 1946 S.C.(J.) 37 followed.

LEY (1828) 1 Lewin 239; DAVIES (1853) 3 C. & K. 328 and SHARP (1957) 41 Cr.App.R. 197 disapproved.

Although persons who, from physical or mental infirmity, cannot follow what is happening in a trial are regarded as "insane" within the meaning of section 2 of the Criminal Lunatics Act, 1800, and accordingly unfit to plead, hysterical amnesia causing the disappearance of all memory of the events surrounding the alleged crime cannot of itself constitute insanity for the purposes of that Act.

RUSSELL *v.* H.M. ADVOCATE, 1946 S.C.(J.) 37 followed.

R. *v.* STAFFORD PRISON (GOVERNOR), *ex p.* EMERY [1909] 2 K.B. 81 approved.

Reference by the Home Secretary under section 19 (*a*) of the Criminal Appeal Act, 1907.

Guenther Fritz Erwin Podola (hereinafter referred to as

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"the appellant") was convicted at the Central Criminal Court on September 24, 1959, of the capital murder of Detective-Sergeant Purdy and was sentenced by Edmund Davies J. to death.

After the appellant was arraigned counsel for the defence intimated that he had evidence raising the preliminary issue whether the appellant was fit to plead and that that issue would be contested. A jury was empanelled to try the issue whether he was insane, so as to be unfit to stand his trial, the contention of the defence being that he was suffering from hysterical amnesia amounting to insanity within the meaning of section 2 of the Criminal Lunatics Act, 1800. A considerable volume of evidence, occupying nine days, was called on this issue both by the defence and the prosecution. Edmund Davies J. directed the jury that the onus was on the defence to satisfy them that on the balance of probabilities the prisoner was insane, and asked them first to consider the question whether he was suffering from genuine hysterical amnesia. The jury, as the result of agreement between counsel, first found that the prisoner was not suffering from genuine hysterical amnesia and then (by direction of the judge) that he was not insane so as to be unfit to stand his trial, and the trial then proceeded, and the appellant was convicted. The appellant did not appeal, but petitioned the Secretary of State. The Secretary of State, being of opinion that the question whether the onus of proof of fitness to plead rests on the prosecution or the defence ought to be considered by the Court of Criminal Appeal, referred the whole case to the court under section 19 (*a*) of the Criminal Appeal Act, 1907.

The Attorney-General (*Sir Reginald Manningham-Buller*, Q.C.) (*J. R. Cumming-Bruce* with him) as *amici curiae*. The argument is directed to assisting the court, should they desire assistance, on matters relating to the jurisdiction or power of the court. It has been decided that there is no right of appeal from a finding that a defendant was fit to plead: JEFFERSON (1908) 1 Cr.App.R. 95; LARKINS (1911) 6 Cr.App.R. 194; also

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that, if there is no right of appeal, the court's jurisdiction is not enlarged on a reference under section 19 of the Criminal Appeal Act, 1907: GRAY (1917) 12 Cr.App.R. 224; FRATSON (1930) 22 Cr.App.R. 29. [He referred also to CABORN-WATERFIELD, 40 Cr.App.R. 110; [1956] 2 Q.B. 385.] The Home Secretary has referred to the court the question whether on the issue of fitness to plead the onus of proof rests on the prosecution or the defence. It has been suggested that in view of the decisions cited the appellant cannot come to the court and ask for relief on that issue and the court has no power to consider the point referred by the Home Secretary. It is conceded that the reference under section 19 (*a*) cannot enlarge the right of appeal conferred by the Act, but under the Act the appellant has a right of appeal against conviction and on that appeal he has a right to contend that there has been a mistrial arising out of the fact that he should never have been called on to plead. [HILBERY J.: If that be right, it would be open to a convicted person to come to the court and ask the court to hear fresh evidence tending to show that he was insane.] Assuming that the court is satisfied that there was a misdirection on onus of proof on the issue of fitness to plead, and that amnesia can amount to unfitness to plead, it would be open to the appellant to say that, on a proper direction, he ought never have been called on to plead and that, therefore, there was a mistrial. Where a mistrial has been followed by a recorded conviction, there is a right of appeal: CRANE *v.* D. P. P., 15 Cr.App.R. 183; [1921] 2 A.C. 299. [THE LORD CHIEF JUSTICE: Take the case where the prosecution allege unfitness to plead and the defence successfully deny it. In such a case there would be no conviction and no right of appeal.] That results from the wording of the Act, just as there is no right of appeal from a verdict of Guilty but Insane, because that does not amount to a conviction. Where, however, there has been a conviction, the convicted person has a right of appeal and it is always open to him to contend that there has been a mistrial. There are a variety of forms of mistrial and a number of cases where a

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mistrial has been held to have taken place because a plea has wrongly been construed as a plea of Guilty. [HILBERY J.: Is there anything in the books suggesting that there can be a mistrial because there has been an adverse finding in an independent inquiry on a preliminary issue?] No, the authorities do not go as far as that. The position here is similar to that which would arise in the case of a plea of *autrefois convict* or *autrefois acquit* which the court had decided and where it was desired to challenge that finding. The main categories of cases where mistrials have been held to have occurred are where a plea has been wrongly construed as a plea of Guilty, where after a change of plea during the trial after an original plea of Not Guilty the verdict of the jury has not been taken, and where the court has been improperly constituted. [HILBERY J.: In all those cases the irregularity occurred in the course of the trial.] That must depend on when the trial can be said to have begun. A plea in bar is not part of the trial. [THE LORD CHIEF JUSTICE: What would have been the position if the reference had been under section 19 (*b*) instead of section 19 (*a*)?] That might have been an undesirable course. The contrast between the two paragraphs is significant. Under (*b*) the reference is wider, but there the court merely advises the Home Secretary. There is no judicial decision and the matter may be decided in private and without argument. Here it is desirable that there should be a judicial decision on the matter. All that was decided in JEFFERSON (*supra*) was that the Act was limited to appeals against conviction and there was no right of appeal from a finding of fitness to plead *simpliciter*. If necessary, the submission will be made that that case was wrongly decided. The finding on the plea is part of the record and the inquiry on the issue forms part of the proceedings. This argument, if desired, will deal with the question of the powers of the court should it reach the conclusion that there had been a misdirection on the preliminary issue and that amnesia could amount to unfitness to plead. [THE LORD CHIEF JUSTICE: Not at this stage.]

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F. H. Lawton, Q.C. (*R. J. S. Harvey* with him) for the appellant. On the plain wording of section 19 (*a*) the court has jurisdiction to decide the issues of where the burden of proof lies, where a question of fitness to plead arises, and how far amnesia can constitute unfitness to plead. When the section uses the words "the whole case," that must mean everything that took place at the Central Criminal Court, including an inquiry with regard to a preliminary matter. The word "case" is not a word of art and has no specific meaning in law, and must be given the meaning which it would have in ordinary parlance. [THE LORD CHIEF JUSTICE: "The whole case" is surely used in contradistinction to the single point which is dealt with under section 19 (*b*).] In the alternative, it is desired to adopt the argument of the Attorney-General. JEFFERSON (*supra*) cannot be regarded as a satisfactory authority. The reports of it are not complete and it is difficult to understand what was decided. In any event, a full court can always overrule a court of three judges. [THE LORD CHIEF JUSTICE: We would do so with reluctance, but where the liberty of the subject is concerned we can overrule a previous decision of the court. I suppose it would be possible, for the removal of all doubts, for us to get an alternative reference from the Home Secretary under section 19 (*b*). We could then act under (*a*) if that course appeared possible, but in any event we could act under (*b*).]

[*The Attorney-General* (*Sir Reginald Manningham-Buller*, Q.C.) intervening. A reference under (*b*) would have this disadvantage. The point arising might be one which the prosecution or the defence desired to take to the House of Lords, but it would appear that there would be no power to grant a fiat on an advisory opinion of the court to the Home Secretary. If the court does reach the conclusion that it is desirable to have a reference under (*b*), no doubt that can easily be arranged. It is submitted, however, that the reference was properly made under (*a*) and it is desirable that the decision on it should be a judgment of the court.]

The matter of fitness to plead was raised at the outset of

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the case, and the judge approved the procedure which was suggested by both sides, that the jury should be empanelled to try the issue in two stages: (i) a special verdict on the facts on whether there was genuine amnesia, and (ii) if the jury so found, a ruling from the judge whether this amounted to insanity constituting unfitness to plead. The common law requires not a trial of a preliminary issue, but an inquiry on it for the guidance of the court, and it may be, therefore, that the issue of burden of proof does not come into the matter at all; certainly it ought not to be laid on the defendant. It is conceded that there have been conflicting authorities on this question. In DYSON (1831) 7 C. & P. 305n., PRITCHARD (1836) 7 C. & P. 303, and TURTON (1854) 6 Cox 385 it was held to lie on the defence; but in DAVIES (1853) 6 Cox 326 it was held to lie on the Crown, and this view was followed by Salmon J. in the recent case of SHARP (1957) 41 Cr.App.R. 197. The old cases and statutes raise the problem of the prisoner who tried to avoid justice by feigning madness. In section 2 of the Criminal Lunatics Act, 1800, the word used was not "proved," but "found," to be insane. Up to the eighteenth century felons had no right to be defended by counsel except on issues of law. There was, therefore, no opportunity to the defence to raise the issue of insanity. The court generally drew attention to it, and would not continue the trial if there was doubt as to the prisoner's sanity. Hale's *Pleas of the Crown*, Vol. I, p. 84, and Hawkins' *Pleas of the Crown*, Vol. I, p. 4, indicate that the trial would continue only if the jury found the prisoner to be feigning. They could not "find" him to be feigning if the burden was on the defence to prove insanity. In LEY (1828) Lewin 239, Hullock B. directed the jury that, if there was a doubt as to the prisoner's sanity, they could not say that he was in a fit state to be put upon his trial. [He referred also to *Russell on Crime*, 1st ed., Vol. I, p. 20, and H.M. ADVOCATE *v.* RUSSELL, 1946 S.C.(J.) 37.] The appellant's case is that he had no memory of any kind for any events which happened at the material time, *i.e.*, between July 1, and July 16, 1959. If that were established, it is

submitted that he was unfit to stand his trial and was insane within the meaning of the Act of 1800. Section 2 was concerned not with insanity at large, but insanity such as would affect his being able to stand his trial. In KEMP, 40 Cr.App.R. 121; [1957] 1 Q.B. 399, where the prisoner suffered from arteriosclerosis but displayed no general sign of mental trouble, Devlin J. intimated that a disease capable of affecting the mind so as to cause a defect, temporary or permanent, of reasoning was a "disease of the mind" within the M'Naghten Rules. The position was to be compared with that under the Act of 1800 under which "it has been held that a deaf and dumb person was not fit to plead and had to be regarded as insane for the purposes of the Act." The observations of Devlin J. in that case apply equally to a plea on arraignment. The essence of the matter is that if there is such a disturbance of the mind that a prisoner cannot put forward a proper defence, he cannot be put on his trial. If he has lost his memory, he cannot instruct counsel what the relevant facts were and in a case of murder he would be deprived of the possibility of putting forward a defence such as provocation on which evidence is required. [PAULL J.: Do you go so far as to say that a man who said that he was so drunk that he could not remember what had happened could not be tried?] No, because the common law draws a distinction between that which is brought about by a man's own act and that which is brought about by the visitation of God, and, as an example of the first category, Coke has instanced drunkenness. [HILBERY J.: Is not hysterical amnesia, as opposed to constitutional amnesia, brought about by a man's own act?] The evidence was that a genuine hysterical amnesia is a reaction of the mind, of its own motion, to the load put on it. The case proceeded on the basis that it was an unconscious reaction and not wilful. Memory must be one of the factors in the issue of fitness to plead; it is a question of degree. No doubt it will be said that the appellant was able to follow the course of the trial and had done so with interest, but that did not mean that he comprehended it. In order to comprehend

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the evidence so as to be able to offer a defence, a man must have a memory into which he can fit what the various witnesses have said. Loss of memory is a disturbance of the mind which prevents a man from telling his story in the way that a sane man could. In PRITCHARD (1836) 7 C.P. 303 a deaf and dumb prisoner was indicted for bestiality. Alderson B. said that the jury must inquire " whether he is of sufficient intellect to comprehend the course of proceedings on the trial so as to make a proper defence . . . and to comprehend the details of the evidence. . . . If you think that there is no certain mode of communicating the details of the trial to the prisoner, so that he can clearly understand them, and be able properly to make his defence to the charge; you ought to find that he is not of sane mind." The old phrase was " in sana memoria " and that was the common law approach. It is submitted that no change was effected by the introduction of the word " insane " into the Act of 1800, and the early authorities on this matter should be followed. The same principle was adopted in R. *v.* STAFFORD PRISON (GOVERNOR), *ex p.* EMERY [1909] 2 K.B. 81 (the case of a deaf mute) and the Scottish case of ROBERTSON (1893) 3 White's Just.Rep. 6 (a case of a monomaniac who suffered from a delusion) shows that none of the questions in the charge in PRITCHARD (*supra*) was itself conclusive.

Maxwell Turner (*J. H. Buzzard* with him) for the Crown [after receiving an intimation that the court did not desire to hear him on the question of onus of proof]. The meaning of " insanity " from the point of view of unfitness to plead has been extended, as a result of English and Scottish decisions, to cases of deaf mutes and persons unable to communicate with or be communicated with by others (R. *v.* STAFFORD PRISON (GOVERNOR), *ex p.* EMERY (*supra*) and ROBERTSON (*supra*)), but it has never had any further extension. There never has been a case in the history of English law where it has even been contended that amnesia relating to the time of the commission of the offence can render a prisoner otherwise sane and normal unfit to plead. The test still remains whether

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the criteria laid down in PRITCHARD (*supra*) are satisfied. Here there is no question that the appellant was able to comprehend the details of the evidence and had sufficient intellect to know that he was entitled to challenge a juror. The third criterion that he must be " of sufficient intellect to comprehend the course of the proceedings on the trial so as to be able to make a proper defence " means that he was capable of understanding what went on at the trial. Mere loss of memory of the facts of the offence through a mental disturbance could never be a ground for a verdict of unfit to plead. The test as laid down in PRITCHARD (*supra*) was not whether the prisoner was able to put forward any defence which he might have put forward, but whether he was of sufficient intellect to comprehend the course of the proceedings so as to make a proper defence. In the case of a deaf mute it is impossible to communicate with him in such a way as to be able to realise whether he can understand what is happening at the trial, but in the case of amnesia there is no suggestion that the prisoner could not satisfactorily instruct counsel at the trial.

F. H. Lawton, Q.C., in reply. In the third criterion in PRITCHARD (*supra*) " comprehend " must mean to lay hold of something with the intellect; it means not merely understanding, but understanding with the intellect so as to see the significance of what is happening. If a man does not and cannot, because of a disturbance of the mind, appreciate the significance of the evidence, it is meaningless to him and he does not comprehend it.

At the conclusion of the arguments the Lord Chief Justice said that under section 19 (*a*) of the Criminal Appeal Act, 1907, the case fell to be heard and determined by the court as in the case of an appeal by a person convicted. The court, having heard the case as if it were an appeal, was of the clear opinion that the appeal should be dismissed. The court would put its reasons into writing and would give them at a later date.

Cur. adv. vult.

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October 20. The judgment of the court was read by

THE LORD CHIEF JUSTICE: This is the judgment of the court in the preparation of which we have all collaborated, including Donovan J., who is unable to be present today.

On September 24, 1959, at the Central Criminal Court, one Guenther Fritz Erwin Podola (hereinafter referred to as the "appellant") was found guilty of the capital murder of Detective Sergeant Raymond Purdy and was sentenced to death. He did not appeal against that conviction, but on October 5, 1959, the Secretary of State, being of opinion that a question of law raised by the case, namely, whether the onus of proof on the issue of fitness to plead rests on the prosecution or the defence, ought to be considered by this court, referred the whole case to the court for determination under section 19 (*a*) of the Criminal Appeal Act, 1907.

The events leading to the present reference may be shortly stated. On September 10, before the appellant was arraigned, Mr. Lawton, who appeared as counsel on his behalf, informed Edmund Davies J. that he had evidence available which raised a preliminary issue, namely, whether the appellant was fit to plead to the indictment, on the ground that he had completely lost his memory for all events before July 17, the day after his arrest. The learned judge was also informed that this preliminary issue would be contested, and he then heard argument on the question whether the burden of proof in that issue rested upon the defence or upon the prosecution. His decision was given in the following terms: "I rule accordingly upon this preliminary issue that it is for the defence to establish that the accused man is insane so as to be unfit to plead to the indictment." He went on to rule: "It is sufficient for the defence to discharge the burden if they can show, on the balance of probabilities, that this accused is unfit to stand his trial."

At the suggestion of counsel on both sides the trial of the preliminary issue was itself taken in two stages. In the first stage the jury empanelled to try the issue were required to answer a specific question: "Is the defendant now suffering

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from a genuine loss of memory covering at least all the events with which he was concerned between July 1, 1959, and the time of his arrest on July 16?" The trial of this issue lasted for nine days, in the course of which evidence was given by doctors on both sides, and after deliberating for nearly three and a half hours the jury's answer to the question was that the appellant was not suffering from genuine loss of memory. As a result of that answer the second stage of the preliminary issue, in which the jury were required to find whether the appellant was insane so that he could not be tried, was very short. In our judgment the learned judge rightly directed the jury that, in view of their answer to the specific question and in the absence of any other evidence pointing to the appellant's insanity, it was their duty to say that he was fit to stand his trial. The jury's verdict was in accordance with this direction. Having regard to the jury's answer to the specific question, the learned judge was not required to give any ruling or direction upon the issue whether, in the circumstances, the appellant's loss of memory (if established) would have been sufficient in law to bring him within the ambit of section 2 of the Criminal Lunatics Act, 1800. The trial of the appellant on the charge of capital murder was then begun. He pleaded Not Guilty, but was convicted and sentenced to death. No criticism is made on his behalf as to that trial.

The reference to this court was heard by us on October 14 and 15, 1959. At the outset of the hearing the Attorney-General, as *amicus curiae*, raised the question of our jurisdiction to hear the reference. Section 19 (*a*) of the Criminal Appeal Act, 1907, provides as follows: "Nothing in this Act shall affect the prerogative of mercy, but the Secretary of State on the consideration of any petition for the exercise of His Majesty's mercy, having reference to the conviction of a person on indictment or to the sentence (other than sentence of death) passed on a person so convicted, may, if he thinks fit, at any time either—(*a*) refer the whole case to the Court of Criminal Appeal, and the case shall then be heard and determined by the Court of Criminal Appeal as in the case of an

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appeal by a person convicted." In substance the Attorney-General's contention was that this court's jurisdiction to hear and determine a case referred to it under section 19 (*a*) was limited to cases in which the person convicted would have had a right under the Act to appeal to the court. He pointed out that a possible difficulty in the way of our hearing the reference was created by the decision of this court in JEFFERSON'S CASE (1908) 1 Cr.App.R. 95, which is most fully reported in 24 T.L.R. 877. In that case the accused man had been found fit to plead and had then been tried for murder and convicted. In his appeal it was contended (*inter alia*) that on the medical evidence given at the preliminary inquiry he ought not to have been tried on the main charge at all. Darling J. intervened to say: "The Act only gives leave to appeal against a conviction; how can you say that a finding that a prisoner is fit to plead is a conviction?" Thereupon counsel for the appellant said that he must withdraw the appeal against the finding that the prisoner was fit to plead. Darling J. then added: "I want to make that clear as a ruling of the court." What was intended to be covered by that ruling is not altogether clear. It may be that its effect was limited to this: that the Act of 1907 does not enable this court to hear an appeal specifically expressed to be an appeal against a finding on a preliminary issue as to an accused person's fitness to plead, such finding not being a conviction. On the other hand, that ruling has apparently been taken to be a ruling that a person who has been found fit to plead, and thereafter convicted, cannot in any circumstances question the finding on the preliminary issue, or matters which arose in the course of its hearing. If the latter is the true meaning, we think that the ruling was wrong. If a convicted person appeals against his conviction on the ground that the hearing of the preliminary issue was open to objection for error in law, so that he should never have been tried on the substantive charge at all, we are of opinion that this court has jurisdiction to entertain the appeal. In such a case it seems to us that the principles laid down in CRANE *v.* D. P. P., 15 Cr.App.R. 183;

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[1921] 2 A.C. 299 are applicable, and that a convicted person is entitled to contend, in the words of Lord Sumner (15 Cr. App.R. at p. 216; [1921] 2 A.C. at p. 332, that "he should not have been given in charge to the jury as he was, or have been made the subject of any verdict at all, but should have had the proceedings stopped at the outset."

In our judgment, the appellant in the present case could have appealed against his conviction upon the ground that in the hearing of the preliminary issue the learned judge misdirected the jury, and therefore that he should never have been tried upon the main charge at all. It follows that this court has jurisdiction to hear and determine the case referred.

In these circumstances we do not think it necessary to deal with an alternative contention put forward by Mr. Lawton, that on the true construction of section 19 (*a*) of the Act of 1907 this court has jurisdiction to hear and determine a case referred to it, even if the convicted person could not have appealed against the finding complained of. As it seems to us, a situation of that sort is unlikely to arise in practice and we think it undesirable to rule upon it in advance.

In the course of the hearing before us we heard argument not only on the question specifically mentioned in the reference under section 19 (*a*), but also on the question to what extent (if any) amnesia could in law be regarded as a form of insanity within the meaning of section 2 of the Criminal Lunatics Act, 1800. Before we decided to consider the second of these questions it was necessary for us to decide whether, in view of the decision of this court in CABORN-WATERFIELD, 40 Cr. App.R. 110; [1956] 2 Q.B. 379, it was open to us to do so. In giving the judgment of the court in that case the Lord Chief Justice (Lord Goddard) said (40 Cr.App.R. at p. 114; [1956] 2 Q.B. at p. 385): "The court thinks that when a matter of this sort is referred by the Secretary of State and we see at once the ground on which the Secretary of State has referred the case to us, the court must confine itself to that ground." In the present case the specific question referred to us related to onus of proof, but in our view that question

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involved by necessary implication the overriding question whether the issue, in respect of which there was doubt as to the onus of proof, was itself a relevant issue to be tried. In other words, the question as to onus of proof could only arise if the alleged amnesia could in law bring the appellant within the scope of section 2 of the Act of 1800. Accordingly, in hearing argument as to the legal effect of amnesia, we were considering a matter necessarily involved in the reference and were not departing in any way from the principle laid down in CABORN-WATERFIELD'S case (*supra*). The decision in that case remains unaffected by the present case.

We deal first with the matter specifically referred to us, namely, the question as to onus of proof. The relevant words in section 2 of the Act of 1800 are as follows: "If any person indicted for any offence shall be insane and shall upon arraignment be found so to be by a jury lawfully empanelled for that purpose, so that such person cannot be tried upon such indictment . . ." Those words do not indicate how or by whom the question of the accused's sanity is to be raised, but it is now well established that the question may be raised either by the prosecution or by the defence or by the court itself. Indeed, if a court becomes aware, either before or during a trial, that the accused person's sanity is doubtful, it is the duty of the court to have the doubt resolved before beginning or continuing the trial. For the purpose of deciding whether a person is "insane . . . so that he cannot be tried upon the indictment" a jury is empanelled, and as Mr. Lawton emphasised on behalf of the appellant, the procedure before that jury is an inquiry and not a trial. In most cases in which this course is taken, there is no contest between the prosecution and the defence as to the accused person's insanity, and the evidence to that effect is unchallenged. In such cases, although the jury must be satisfied of the accused person's insanity before so finding, the question of onus of proof is not a live issue. But cases have arisen, of which the present one is an example, where either the prosecution or the defence has challenged the alleged insanity, and in a case in Scotland

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(RUSSELL *v.* H.M. ADVOCATE, 1946 S.C.(J.) 37), to which more detailed reference will be made later, the court itself refused to give effect to a plea in bar of trial put forward on behalf of the defence and not contested by the prosecution.

It was contended by Mr. Lawton that, inasmuch as the proceedings on the issue of insanity are an inquiry and not a trial, it is wrong to introduce any principle as to onus of proof, derived from proceedings properly regarded as trials. We do not agree with this contention. In our judgment the right principles may be stated as follows:

1. In all cases in which a preliminary issue as to the accused person's sanity is raised, whether that issue is contested or not, the jury should be directed to consider the whole of the evidence and to answer the question "Are you satisfied upon that evidence that the accused person is insane so that he cannot be tried upon the indictment?" If authority were needed for the principle, it is to be found in the very words of the section itself, quoted above.

2. If the contention that the accused is insane is put forward by the defence and contested by the prosecution, there is, in our judgment, a burden upon the defence of satisfying the jury of the accused's insanity. In such a case, as in other criminal cases in which the onus of proof rests upon the defence, the onus is discharged if the jury are satisfied on the balance of probabilities that the accused's insanity has been made out.

3. Conversely, if the prosecution alleges and the defence disputes insanity, there is a burden upon the prosecution of establishing it.

These principles are in accordance with those laid down in a number of the cases to which our attention was called. In DYSON (1831) 7 C. & P. 305n., Parke J., as he then was, told the jury that "if they were satisfied that the prisoner had not then from the defect of her faculties intelligence enough to understand the nature of the proceedings against her, they ought to find her not sane." Five years later Alderson B., in PRITCHARD (1836) 7 C. & P. 303, expressly

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followed the course taken in DYSON's case (*supra*) and observed that DYSON's case (*supra*) had been considered by several of the judges who had approved of the course adopted by Parke J. In TURTON (1854) 6 Cox 385 Cresswell J., addressing counsel for the defence, said: "Why is a man to be presumed insane when called upon to plead? The presumption is that he is sane. I do not see any sufficient reason for deviating from the old practice. If you suggest that the prisoner is not in such a state of mind as to be able to plead to the indictment, you must give evidence of the fact." In RIVETT's case, tried in 1950, Stable J. directed the jury to answer a question worded in similar terms to that contained in the first of the principles set out above, and when the case came before this court on appeal (1950) 34 Cr.App.R. 87, Lord Goddard referred to the learned judge's charge as "careful and accurate." Lastly, in the Scottish case of RUSSELL *v.* H.M. ADVOCATE, 1946 S.C.(J.) 37, the Lord Justice-Clerk, in giving the opinion of the court on appeal by the accused, said (at p. 44): "The onus is always on the accused to justify a plea in bar of trial and to do so not to the satisfaction of expert witnesses but to the satisfaction of the court."

Decisions conflicting with the principles enunciated above were brought to our notice: LEY's CASE (1828) 1 Lewin 239; DAVIES (1853) 3 C. & K. 328, and SHARP (1957) 41 Cr.App.R. 197. In our judgment, these cases must be taken to have been wrongly decided, and a statement in Halsbury's *Laws of England*, 3rd ed., Vol. 10, at p. 403, to the effect that when a preliminary issue of this sort is raised "the onus is on the prosecution to prove the sanity of the defendant" is incorrect.

In our judgment, therefore, the direction of Edmund Davies J. in the present case on the subject of onus of proof was right.

As already indicated we have, however, thought it necessary, in the circumstances of the case, to consider whether the alleged state of mind of the appellant would have brought him within the provisions of section 2 of the Criminal Lunatics

Act, 1800, had the jury found that that state of mind was a genuine one.

In considering this problem it is important to stress that the appellant, in the proceedings at the Central Criminal Court, relied solely on an hysterical amnesia preventing him from remembering events during the whole of the period material to the question whether he committed the crime alleged. There was no suggestion that his mind in other respects was not a completely normal mind. His case on this point was that this defect of memory rendered him unable properly to instruct his advisers, with the consequence that he could not make "a proper defence." It was urged that the killing may have been accidental, or that there may have been provocation, but the appellant could give no instructions thereon. This defect, it was argued, rendered the appellant insane within the meaning of the Act of 1800.

Mr. Lawton, in the course of his careful and at first attractive argument, pointed out that the Act of 1800 was an Act declaratory of the common law, and invited us to go back and trace historically the meaning of the word "insane" which appears in the Act. He referred to the expressions "non sana memoria," "non sane memory," and "not of sound memory" which are to be found in the books. He relied mainly on the following passages in Hale's *Pleas of the Crown*, Vol. 1, pp. 34–35: "If a man in his sound memory commits a capital offence, and before arraignment becomes absolutely mad, he ought not by law to be arraigned during such his frenzy, but be remitted to prison until that incapacity be removed, the reason is because he cannot advisedly plead to the indictment, . . . and if such person after his plea and before his trial become of non sane memory, he shall not be tried." Mr. Lawton urged that these expressions must apply where all memory of the events surrounding the alleged crime has disappeared owing to hysterical amnesia.

It is to be observed, however, that the above passages occur in Chapter 4, where Sir Matthew Hale is considering "the defect of idiocy, madness and lunacy" in reference to

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criminal offences. It will also be seen that in the first passage quoted, "sound memory" is contrasted with "absolutely mad" and with "frenzy." Accordingly, in our judgment the word "memory" there used does not relate to recollection, but to a state of mind. We think that this meaning is to be attached to the word "memory," not only in the passages in Hale, but also in the passage in Coke's notes on BEVERLEY'S CASE ((1603) 2 Co.Rep. 572) and in other authorities previous to the Act of 1800 to which we were referred.

The words "If any person . . . shall be insane . . . so that such person cannot be tried upon such indictment" contained in section 2 of the Act of 1800 have in many cases since 1800 been construed as including persons who are not insane within the M'Naghten Rules, but who, by reason of some physical or mental condition, cannot follow the proceedings at the trial and so cannot make a proper defence in those proceedings. A well-known illustration is that of a deaf mute who is also unable to write or to use and understand sign language. It was in the case of a deaf mute that Alderson B., in PRITCHARD (*supra*), laid down the tests which ought to be applied when juries are considering whether a prisoner ought not to be tried by reason of his mental condition. These tests have been followed so often that they may be said to be firmly embodied in our law (see, for example, BERRY (1876) 1 Q.B.D. 447, and R. *v.* STAFFORD PRISON (GOVERNOR), *ex p.* EMERY [1909] 2 K.B. 81).

In his address to the jury on the preliminary issue as to whether the prisoner was sane or not, Alderson B. said: "There are three points to be inquired into: First, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence—to know that he might challenge any of you to whom he may object—and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation. Upon

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this issue, therefore, if you think that there is no certain mode of communicating the details of the trial to the prisoner, so that he can clearly understand them, and be able properly to make his defence to the charge, you ought to find that he is not of sane mind. It is not enough that he may have a general capacity of communicating on ordinary matters."

It is not suggested in this case that the appellant could not plead to the indictment, or that he did not know he had the right of challenge, or that he could not follow the evidence given, but Mr. Lawton submitted strongly that where there was the partial obliteration of memory alleged in this case, a prisoner could not make " a proper defence " and could not " comprehend " the details of the evidence within the meaning of the words used in PRITCHARD'S case (*supra*).

So far as " making a proper defence " is concerned, it is important to note that the words do not stand alone, but form part of a sentence the whole of which is " whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence." In other words, this passage itself defines what Alderson B. meant by " making a proper defence." As to the word " comprehend," we do not think that this word goes further in meaning than the word " understand." In our judgment the direction given by Alderson B. is not intended to cover and does not cover a case where the prisoner can plead to the indictment and has the physical and mental capacity to know that he has the right of challenge and to understand the case as it proceeds.

This case is the first attempt in England to assert that hysterical amnesia covering the period of the events which are the subject of the indictment renders a man insane so that he cannot be tried. The matter has, however, come before the courts in Scotland. In 1907 there was the case of H.M. ADVOCATE *v.* BROWN in the High Court of Justiciary: 1907 S.C.(J.) 67. In the course of summing up the Lord Justice General, Lord Dunedin, said (at p. 77): " It (insanity) means insanity which prevents a man from doing what a truly sane man would do and is entitled to do, maintain in sober sanity

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his plea of innocence and instruct those who defend him as a truly sane man would. . . . But that is not enough. There is something which is not generally asked about, and that is that a person who is giving these instructions should not only intelligently, but without obliteration of memory as to what has happened in his life, give a true history of the circumstances of his life at the time the supposed crime was committed."

These are strong words, but it is important to realise that the medical evidence was that Brown was of unsound mind and not capable of pleading to the indictment, quite apart from any loss of memory.

In 1946 the case of RUSSELL *v.* H.M. ADVOCATE came before the High Court of Justiciary: 1946 S.C.(J.) 37. In that case Lord Sorn, before proceeding with the case on its merits, held a preliminary inquiry into the facts upon which the prisoner based her plea in bar of trial. That plea was that she was suffering from hysterical amnesia and on that account was unable to plead to the charge or give instructions for her defence. That case, therefore, was a case very similar to the one before us. In his judgment upon this preliminary matter (which he tried without a jury) Lord Sorn said that he was quite satisfied that the accused had in fact suffered a loss of memory. He went on to say at p. 39: "The next question and the difficult question for me is: 'Does this loss of memory render her unfit to plead?'" He continued at p. 40: "I have felt that the court in dealing with a plea in bar of trial is primarily concerned with the condition of the accused now at the time of trial and no other time. She is able to instruct, in my opinion, a defence, even though that defence has the peculiarity of including in its features that the accused has forgotten the period of the events dealt with in the charge. . . . I am unable to see that unfairness should follow from this situation. The Crown must prove their case and must prove it to the satisfaction of the jury, and the accused can tell the jury that she has no recollection of these events."

This decision of Lord Sorn came by way of appeal before

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the Lord Justice-Clerk (Lord Cooper), Lord Mackay and Lord Stevenson.

In the judgment of the court the Lord Justice-Clerk supported Lord Sorn, and in the course of his judgment said at p. 46: "The only grounds associated with the abnormal personal condition of the accused which our law and practice have ever recognised as the basis of a plea in bar are (a) insanity either in the ordinary sense or in the special sense of the Lunacy (Scotland) Act, 1857, s. 87" (where the words are similar to the words of the Act of 1800) "and (b) the condition of a deaf mute. There is no trace in either Scotland or England of a plea in bar founded on the loss of memory by a sane and otherwise normal accused person." Later he said, at p. 47: "I do not consider that they" (that is, the dicta which are found in BROWN'S case (*supra*)) "were intended to be understood, or are capable of being understood, literally as applying to the case of a sane prisoner . . . for so to read them would come near to paralysing the administration of criminal justice." Still later he said, at p. 48: "The conclusions which I feel bound to draw are that loss of memory may be an important element in leading to the conclusion that an accused person is insane. . . . But, if it falls short of that, loss of memory in a person otherwise normal and sane plays its full part if it is sufficiently proved in increasing the onus on the Crown and in raising doubts to which it may be the duty of the jury to give effect in a verdict of acquittal after investigation of the whole case. But as our law stands it can have no further or other effect." As we understand it, the words "in increasing the onus on the Crown" do not mean that strictly the onus is any greater, but that a judge should point out to a jury that they must take into consideration carefully the fact that the accused cannot remember the events.

We agree with the opinions stated and the conclusions arrived at in the case of RUSSELL *v.* H.M. ADVOCATE (*supra*). The word used in the Act of 1800 is the word "insane." It is true that in the case of a deaf mute the word "insane" does not strictly apply, but as was pointed out in R. *v.* STAFFORD

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PRISON (GOVERNOR), *ex p.* EMERY (*supra*) by Lord Alverstone, the practice of including as coming within that word the case of persons who, from mental or physical infirmity, cannot follow what is happening in a case is in accordance with reason and common sense. We cannot see that it is in accordance either with reason or common sense to extend the meaning of the word to include persons who are mentally normal at the time of the hearing of the proceedings against them, and are perfectly capable of instructing their solicitors as to what submission their counsel is to put forward with regard to the commission of the crime.

To sum up the matter before us:

1. In our judgment there was a right of appeal by the appellant to this court.
2. There is no criticism to be made of the summing-up of the learned judge on the preliminary issue.
3. Even if the loss of memory had been a genuine loss of memory, that did not of itself render the appellant insane so that he could not be tried on the indictment, and no other ground for alleging insanity was put forward.

Accordingly, as the court stated earlier, this appeal is dismissed.

Appeal dismissed.

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